Supreme Court, U.S.
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No. [illegible] OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

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LANA CHRISTINE ACTY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

◆

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Eighth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner was denied her right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution when defense counsel sought a plea bargain on behalf of Petitioner's co-defendant which would have required him to testify against Petitioner.

Whether counsel's advice to Petitioner not to testify when he represented both Petitioner and her co-defendant, violated Petitioner's right to effective assistance of counsel under the Sixth Amendment to the United States Constitution.

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The opinion of the United States Court of Appeals for the Eighth Circuit, hereafter "Eighth Circuit," is contained in Appendix pp. 1-11.

The Judgment of the United States District Court for the Southern District of Iowa is contained in Appendix pp. 12-29.

The Order of the Eighth Circuit denying Petitioner's Petition for Rehearing is contained in Appendix p. 30.

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JURISDICTION

The Eighth Circuit filed judgment on March 7, 1996. (App. pp. 1-13). Petitioner's Petition for Rehearing was denied on May 20, 1996. (App. p. 34).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). Certiorari review is appropriate as the Eighth Circuit has rendered a decision in conflict with the decisions of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Certiorari review is further appropriate to decide Constitutional questions of great import as regard the inevitable corrosive effect of the Eighth Circuit's decision concerning the denial of Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution.

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CONSTITUTIONAL PROVISIONS

SIXTH AMENDMENT:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Sixth Amendment.

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STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the Southern District of Iowa was pursuant to 28 U.S.C. Section 2255. The jurisdiction of the Eighth Circuit was based on 18 U.S.C. Section 3742(a) and 28 U.S.C. Section 1291.

In 1977, Petitioner and her husband (now ex-husband), George Michael Moore, formed an Iowa corporation named "Posters 'N' Things, Ltd." (hereafter "Posters"). Law enforcement authorities subsequently received complaints that Petitioner and Moore were selling drug paraphernalia through the retail outlet, and on March 28 of 1990 seized certain of Poster's inventory alleged to constitute paraphernalia as defined under the

Mail Order Drug Paraphernalia Control Act ("Drug Paraphernalia Act"), 21 U.S.C. § 857. Items seized included print advertisements, pipes, scales, vitamins and diet aids.

The same day Petitioner phoned attorney Lawrence Scalise who agreed to meet with Petitioner and Moore on March 29, 1990. (App. p. 35) (Acty depo. at 15). The three met alone and during their meeting agreed that Scalise would represent Petitioner, Moore and Posters on what they anticipated would be forthcoming criminal and civil charges stemming from the raid on Posters. (App. pp. 36, 56, 59) (Acty depo. at 16; Scalise depo. at 39; Sandre depo. at 4).

Scalise informed Petitioner and Moore they might be personally indicted. Moore, in response, told Scalise that he had nothing to do with the operation of Posters. (App. pp. 37, 39) (Acty depo. at 18, 21). Scalise failed to explain to Petitioner and Moore potential conflicts that could arise in his dual representation of them. (App. pp. 38-39) (Acty depo. at 19, 21). He never set the conflicts out in writing and never requested a written waiver. (App. p. 51) (Scalise depo. at 11).

The following week, Scalise agreed to meet Petitioner and Moore in Las Vegas where they were attending a conference of the American Pipe and Tobacco Council (APTC). (App. p. 37) (Acty depo. at 18). The Council's executive director, Robert Vaughn, was in attendance at the conference and agreed, at Petitioner's request, to join the meeting between Scalise, Moore and herself. In his capacity as APTC executive director, Vaughn had in the past provided Petitioner with interpretations and analysis of statutes relevant to the operation of Posters. (App. pp. 77-78) (Vaughn depo. at 35). He had particular expertise in cases arising under the Drug Paraphernalia Act. (App. p. 68) (Vaughn depo. at 7). Vaughn was a practicing attorney in Tennessee, but had never represented Petitioner in an individual capacity. (App. pp. 76, 78) (Vaughn depo. at 36).

During the Las Vegas meeting between Petitioner, Moore, Scalise and Vaughn, Vaughn solicited from Petitioner and/or Moore a token one dollar bill intended to establish an attorney-client relationship that would allow for confidential discussion of their case for the duration of their meeting. (App. pp. 69-70) (Vaughn depo. at 11-12). During this meeting, Scalise elicited Vaughn's advice on the case generally and sought his agreement to serve as a witness. (App. p. 64) (Sandre depo at 22). Scalise and Vaughn discussed Scalise's plans to pursue an "advice of counsel" defense, under which Scalise would argue Petitioner and Moore received inappropriate advice from Vaughn regarding the legal operation of Posters. (App. p. 64) (Sandre depo at 22).

On their return to Iowa, Petitioner and Moore continued to meet regularly with Scalise concerning the anticipated indictment. (App. p. 38) (Acty depo at 19). Scalise's partner, John Sandre, was gradually brought into the case to assist Scalise. (App. p. 61) (Sandre depo. at 6). Petitioner continued to make payments to Scalise for his representation of her, Moore and Posters. (App. pp. 82-86).

During this period, Petitioner and Moore were experiencing serious marital discord. (App. p. 42) (Acty depo.

at 29). They argued, among other things, over their defense. (App. pp. 62-63) (Sandre depo. at 14). These arguments occurred in the presence of Scalise and Sandre. Petitioner and Moore began shifting blame, with Moore arguing he had nothing to do with the operation of Posters (App. pp. 54, 62, 39) (Scalise depo. at 22; Sandre depo. at 14; Acty depo. at 21) and Petitioner maintaining that seized advertisements and a bong containing residue discovered in their bathroom belonged to Moore. (App. p. 40) (Acty depo. at 22). Each argued the other played a more dominant role in the wrongdoing. The two separated seven to eight times during Scalise's and Sandre's representation of them. (App. p. 42) (Acty depo. at 29). During these separations, Moore lived in California while Petitioner remained in Iowa. (App. p. 42) (Acty depo. at 29). Scalise, Sandre and Vaughn were each aware of Petitioner's and Moore's marital difficulties. (App. pp. 54, 66-67, 75, 42) (Scalise depo. at 22; Sandre depo. at 29; Vaughn depo. at 31; Acty depo. at 29).

On or about April 30, 1990, prior to the indictment, Scalise engaged in discussions with the government on behalf of Moore. Petitioner was not a part of these pre-indictment discussions and was not included in the government's preliminary sentencing calculations. (App. pp. 90-92).

On May 16, 1990, a superseding indictment was filed against Petitioner, her husband, George Michael Moore, and their corporation, "Posters 'N' Things, Ltd." Petitioner was charged in nine (9) counts with violations of 21 U.S.C. § 857(a)(1) (use of interstate conveyance for sale of drug paraphernalia); 18 U.S.C. § 371 (conspiracy to use interstate conveyance for sale of drug paraphernalia); 21

U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (aiding and abetting the manufacture and distribution of cocaine); 21 U.S.C. § 854 (investment of illicit drug profits); 18 U.S.C. § 1956(a)(1)(A) (laundering of monetary instruments gained from proceeds of unlawful activity); and 18 U.S.C. § 1957 (engaging in monetary transactions in property derived from unlawful activity). (App. pp. 93-106).

On May 31, 1990, the government, in response to further plea negotiations initiated by Scalise on behalf of Moore, hand delivered to Scalise a letter signed by Assistant U.S. Attorney Kevin VanderSchel requesting a preplea proffer by Moore. (App. pp. 107-110). Scalise had earlier requested, as noted in the May 31 letter, that Moore be permitted to make such a proffer. Petitioner was not mentioned in the letter, which contained signature lines for Scalise and Moore to signify their acceptance of its terms. On June 11, 1990, VanderSchel wrote Scalise a follow-up letter advising Scalise that Moore had until June 15, 1990, to sign and return the May 31, 1990, letter. (App. pp. 111-112).

The May 31 and June 11 letters contained no bar to Moore testifying against Petitioner. In fact, the May 31 letter specifically mentioned the possibility that Moore would be called to testify. (App. pp. 107-112). Neither Scalise nor Sandre informed Petitioner they were approaching the government on behalf of Moore. Petitioner first learned of the letters from VanderSchel to Scalise during the course of her habeas corpus proceedings at the District Court level. (App. p. 41) (Acty depo. at 24).

On July 10, 1990, John Sandre filed an appearance with the Court for Petitioner and Moore. (App. p. 62) (Sandre depo at 8).

On October 28, 1990, Moore, apparently confused over who was representing him, faxed a letter, on California letterhead, to Vaughn, with whom Scalise had evidently been in contact, asking him whether he was representing Petitioner or him and complaining that no one had told him. (App. p. 87).

In early November, 1990, Petitioner and Moore were in their home together when Moore informed Petitioner she needed to find new counsel. (App. p. 42) (Acty depo. at 29). Acty asked Vaughn to represent her and he agreed. (App. p. 43) (Acty depo. at 30). She knew no one else who, three weeks prior to trial, was knowledgeable on her case. (App. pp. 47-48) (Acty depo. at 36).

On November 15, 1990, approximately three weeks prior to trial, Vaughn entered a general appearance for Petitioner. (App. p. 72) (Vaughn depo at 16). Vaughn did not discuss the continuing conflicts with Petitioner when she retained him. (App. pp. 76-77) (Vaughn depo. at 32). Neither Scalise nor Sandre filed a notice of withdrawal from representation of Petitioner at this or any later point.

At the time Vaughn entered his appearance, there was no strict delineation as to whom was representing whom. (App. p. 73) (Vaughn depo. at 18). Scalise, Sandre and Vaughn agreed to apportion the charges against the defendants; each would be responsible for a particular issue as it related to all defendants. Scalise was responsible for the charges of manufacturing a controlled substance and aiding and abetting, Sandre handled the money laundering charges and Vaughn was responsible for the paraphernalia charges. (App. pp. 65, 76-77, 44-45) (Sandre depo. at 24; Vaughn depo. at 31-32; Acty depo. at 31-32). Neither Petitioner nor Moore consented to this arrangement between the three attorneys. (App. p. 76) (Vaughn depo. at 32).

Vaughn did not participate in any pre-trial motions (App. p. 71) (Vaughn depo. at 15), and no joint defendant agreement was filed with the Court to indicate the parties had agreed to participate collectively on pre-trial motions.

Trial began on December 10, 1990. Petitioner wanted to testify on her own behalf but, on Vaughn's advise, declined to do so. (App. pp. 74-75, 45-46) (Vaughn depo. at 30; Acty depo. at 32). Vaughn reasoned that Petitioner's testimony would subject her to questioning regarding the "bong" and residue discovered in the bathroom of the home she shared with Moore. (App. pp. 74-75, 46) (Vaughn depo. at 30) (Acty depo. at 33). Petitioner wanted specifically to testify concerning old advertisements seized by the government during its raid on Posters. (App. pp. 75, 45-46) (Vaughn depo. at 30; Acty depo. at 32). Those advertisements, which suggested various illicit uses of several products, were produced by Moore for use in a wholesale business years prior to the raid on Posters and prior to passage of the Drug Paraphernalia Act; Petitioner had nothing to do with them. (App. pp. 45-46) (Acty depo at 32). But Petitioner, on

Vaughn's advice, declined to testify and the advertisements were in fact used against her at trial to establish scienter. (App. p. 75) (Vaughn depo at 30). At no point before or during Petitioner's trial did Scalise, Sandre or Vaughn inform the court of any potential conflict in their representation of her. (App. p. 56) (Scalise depo. at 28).

Petitioner was convicted on each of the nine counts against her, and sentenced on June 11, 1991, to imprisonment for a term of 108 months, followed by five years of supervised release. In addition, she was fined $150,000. (App. pp. 113-121).

Petitioner timely filed her notice of appeal on June 18, 1991. The United States Court of Appeals for the Eighth Circuit affirmed her conviction and sentences on July 13, 1992. Her Suggestion for Rehearing En Banc was denied August 17, 1992. Certiorari was granted by the United States Supreme Court and oral argument was heard October 5, 1993. The United States Supreme Court affirmed the judgment of the Court of Appeals May 23, 1994, holding that the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. § 857(a)(1), requires proof of scienter and that the Act is not unconstitutionally vague. *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 114 S.Ct. 1747, 128 L.Ed.2d 539 (1994). Petitioner's Petition for Rehearing was denied June 27, 1994. Petitioner subsequently filed a motion to vacate, set aside, or correct her conviction pursuant to 28 U.S.C. § 2255. On March 9, 1995, the United States District Court for the Southern District of Iowa entered an Order denying her relief. (App. pp. 14-33). The Eighth Circuit Court of Appeals affirmed the District Court's decision on March 7, 1996. (App. pp. 1-13). Petitioner's Petition for Rehearing was denied by the Eighth Circuit on May 20, 1996. (App. p. 34). Petitioner here seeks certiorari review of the Eighth Circuit's decision affirming the District Court's denial of Petitioner's Motion under 28 U.S.C. Section 2255.

On August 24, 1994, in relation to Petitioner's Section 2255 Motion, Scalise was served with a subpoena commanding him to produce all files pertaining to Petitioner. In a letter dated August 25, 1994, directed to the undersigned attorney, Scalise responded he had no files related to Petitioner and denied having represented her. (App. pp. 122-23). Scalise has additionally been unable to produce any of Petitioner's billing records. (App. pp. 50-53) (Scalise depo. at 8, 12-13). His appointment books for the period "went out the window." (App. pp. 53-54) (Scalise depo. at 17). Scalise has additionally been unable to locate any files pertaining to Moore.

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ARGUMENT

I. COUNSEL'S ATTEMPT TO NEGOTIATE A PLEA BARGAIN ON BEHALF OF PETITIONER'S CO-DEFENDANT WHICH WOULD HAVE REQUIRED HIM TO TESTIFY AGAINST PETITIONER VIOLATED PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The right to counsel as guaranteed by the Sixth Amendment to the United States Constitution requires criminal defendants receive effective assistance at all stages of the proceedings against them. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). Assistance of counsel free from conflicts of interest is implicit in that right. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980). In a case of joint representation of conflicting interests the evil "is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." *Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S.Ct. 1173, 1182, 55 L.Ed.2d 426 (1978) (emphasis in original).

In a post-conviction setting, where no trial objection was made, a defendant must demonstrate an actual conflict of interest adversely affected her lawyer's performance. *Id.* Once an actual conflict of interest is shown, prejudice is presumed. *Id.* "'Adverse affect' is a less onerous standard, of course, than the outcome-determinative 'prejudice' standard." *United States v. McCaskey*, 9 F.3d 368, 381 (5th Cir. 1993), cert. denied, 114 S.Ct. 1565, 128 L.Ed.2d 24 (1994).

A lawyer may not seek or accept concessions favorable to one client by any agreement which is detrimental to the legitimate interests of another client. ABA Stds, The Defense Function Std 4-6.2(c). Scalise attempted to negotiate a deal for Moore, without Petitioner's knowledge or consent, that not only impacted on her ability to negotiate her own deal, but required Moore to testify against Petitioner on behalf of the government. (App. pp. 90-92, 107-110). Scalise did not inform Acty of the substance of his negotiations with the government or of the impact on her sentence of any substantial assistance *she* might be able to offer. (App. p. 41) (Acty depo. at 24). On the other hand, he was negotiating with the government for Moore to make a proffer – what would be the first, and therefore most significant proffer.

When counsel negotiates a plea agreement for one client upon the condition that he testify against another, an actual conflict of interest is created. *Cates v. Superintendent, Indiana Youth Center*, 981 F.2d 949, 955 (7th Cir. 1992). In *Ruffin v. Kemp*, 767 F.2d 748 (11th Cir. 1985), trial counsel for Ruffin represented him and a co-defendant in a murder and robbery case. During the course of proceedings before trial, defense counsel negotiated a plea bargain on behalf of the co-defendant. *Id.* at 749-50. Under the agreement, Ruffin's co-defendant was required to testify for the state against Ruffin. *Id.* While the agreement never materialized, the Court of Appeals nevertheless found that "actual negotiations for a plea bargain on behalf of [Ruffin's co-defendant] which involved the offer of [his] testimony against Ruffin," had taken place. *Id.* at 750.

The court in *Ruffin* held Ruffin's attorney "labored under an actual conflict of interest." *Id.* at 751. As such, while counsel was negotiating a plea for Ruffin's co-defendant, "he could not at the same time effectively negotiate a plea bargain for Ruffin and offer Ruffin's testimony against [his co-defendant] as part of the deal." *Id.* at 752. As a result, the conflict of interest adversely affected counsel's performance. *Id.*

Similarly, in *Zembowski v. DeRobertis*, 771 F.2d 1057 (7th Cir. 1985), trial counsel for Zembowski also represented two of Zembowski's co-defendants in a robbery case. Prior to trial, the state made an offer to Zembowski's attorney to immunize one of Zembowski's codefendants in exchange for her testimony against her two co-defendants. *Id.* at 1060. Trial counsel urged the codefendant to accept the offer, ignoring the clear conflict of interest. *Id.* Despite the fact the offer was never accepted, the Court of Appeals found trial counsel's advice to accept the state's offer, provided "sufficient proof of a conflict that adversely affected counsel's performance." *Id.* at 1064. *See also Baty v. Balkcom*, 661 F.2d 391, 397 (5th Cir. 1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982) (where counsel's multiple representation resulted in a failure to seek a plea agreement for petitioner, such conflict held sufficient to grant petitioner's habeas petition).

In this case Scalise's conduct created an actual conflict of interest in two situations. The first conflict occurred when Scalise attempted to negotiate a plea agreement for Moore under which Moore would testify against Petitioner. The second occurred when Scalise sought a plea agreement for Moore, but failed to do so for Petitioner. Both situations created an actual conflict of interest which adversely affected Petitioner's right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. As such, Petitioner is entitled to a new trial.

II. COUNSEL'S ADVICE TO PETITIONER NOT TO TESTIFY WHEN HE REPRESENTED BOTH PETITIONER AND A CO-DEFENDANT, VIOLATED PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Throughout trial, Acty and Moore were both represented by Scalise, Sandre and Vaughn collectively. Vaughn and Sandre each testified the various charges against both defendants were divided among the three attorneys according to their areas of expertise. Mr. Scalise was in charge of defending the issues concerning the manufacturing of controlled substances, Mr. Sandre defended the money laundering charges, and Mr. Vaughn litigated the drug paraphernalia charges. (App. pp. 76-77, 65, 44-45) (Vaughn depo. at 31-32; Sandre depo. at 24; Acty depo. at 31-32). Therefore, Mr. Scalise defended counts four (4) and nine (9) under which both defendants had been charged. Mr. Sandre defended counts five (5), six (6), seven (7), and eight (8), under which Petitioner was charged with all four and under which Moore was charged with two. Mr. Vaughn defended counts one (1), two (2), and three (3) under which Petitioner was charged with all three and under which Moore was charged with two. (App. pp. 93-106). From this division of labor, it is apparent that these three attorneys, rather than merely assisting each other in their areas of expertise, instead defended counts of the Superseding Indictment under which both defendants had been charged. It is therefore impossible to claim Mr. Scalise and Mr. Sandre exclusively represented Moore and Mr. Vaughn exclusively represented the Petitioner. During Sandre's deposition, he even went so far as to admit Scalise called most of the shots as the case proceeded to trial. (App. p. 66) (Sandre depo. at 27).

"An actual conflict occurs when counsel cannot use his best efforts to exonerate one defendant for fear of implicating the other." *United States v. Auerbach*, 745 F.2d 1157, 1162 (8th Cir. 1984) (where defense counsel was faced with either pursuing or abandoning defenses and tactics that would help one defendant but hurt another, court held an actual conflict of interest occurred). Similarly, where one defendant stands to gain significantly by advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing, an actual conflict of interest exists. *United States v. Abner*, 825 F.2d 835, 842 (5th Cir. 1987) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980)).

Petitioner was advised by Vaughn not to testify (App. pp. 74-75) (Vaughn depo. at 30). Vaughn believed in so doing Petitioner would subject herself to questioning concerning a bong and residue seized from Petitioner's and Moore's bathroom. (App. pp. 74-75, 46) (Vaughn depo. at 30; Acty depo. at 33). The bong was used exclusively by Moore, and Petitioner was prepared to testify to that effect. (App. pp. 45-46) (Acty depo. at 32). Furthermore, Petitioner also wanted to testify that certain advertisements which were used against her at trial belonged to a business operated by Moore which existed before the formation of Posters and before the Drug Paraphernalia Act was enacted. These advertisements suggested various illicit uses of certain items. (App. pp. 45-46) (Acty depo.

at 32). Vaughn nonetheless recommended she not take the stand. (App. p. 74) (Vaughn depo. at 30).

At the time these decisions were being made, Moore was corresponding with Vaughn via fax (App. pp. 88-89) and Vaughn continued to represent Moore on the drug paraphernalia charges, while Scalise and Sandre represented Petitioner on the manufacturing controlled substances and money laundering charges. (App. pp. 76-77, 65, 44-45) (Vaughn depo. at 31-32; Sandre depo. at 24; Acty depo. at 31-32). Furthermore, Vaughn continued to rely heavily on Scalise's and Sandre's assistance in the case, having entered it three weeks prior to trial.

In *Baty v. Balkcom*, 661 F.2d 391, 392 (5th Cir. 1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982), the defendant and a co-defendant were originally represented by attorney William D. Smith. When the trial court announced the day before trial that Smith's motion to sever the two defendants was denied, Smith informed the court an attorney named Charles M. Taylor would be representing the defendant at trial. *Id.* at 392-93. Taylor had previously helped Smith prepare the case for trial. *Id.* at 393. The Court of Appeals found Smith and Taylor "worked closely together at trial." *Id.* Furthermore, "[t]rial tactics and defense were a 'joint venture' and decisions as to whether [the defendant and co-defendant] would testify were made by both defendants and both counsel." *Id.* The court held Smith's representation of the defendant did not end after Taylor became lead counsel. *Id.* at 397. Because Smith participated with Taylor in this "joint venture" arrangement, the court found Smith's representation of both the defendants continued through trial. As such, the defendant's right to effective assistance of counsel was violated. *Id.* at 397-98. Although the court in *Baty* misapplied the *Cuyler* standard, finding *Cuyler* did not require a showing of "adverse effect" in order to establish an actual conflict of interest, the court nonetheless held its decision would not have differed if such a showing was required. *Id.* at 397 n.13.

In another case similar to the present, the defendant contended his trial counsel, who was also representing his co-defendants, "vehemently opposed" the defendant's desire to testify. *United States v. Martin*, 965 F.2d 839, 842 (10th Cir. 1992). The defendant claimed had he been allowed to testify, he would have testified that he withdrew from the alleged conspiracy before many of the illegal acts occurred. *Id.* The defendant was precluded from testifying, however, by his attorney's insistence on a joint defense claiming no conspiracy existed. *Id.* The court in *Martin* found the defendant was faced with the "classic conflict situation in which, in order to reduce the degree of his own culpability, he would have to testify in contravention of his co-defendants' theory of defense." *Id.* The court concluded the defendant "may have been a less culpable participant in the illegal activity." *Id.* at 843. As such, it appeared to the court that "had Defendant been able to testify, he may have been able to exculpate himself to some degree." *Id.* Therefore, the court found the existence of an actual conflict of interest. *Id.*

The present case is very similar to *Baty* and *Martin*. In *Baty* the court held the attorneys for the two defendants, by working together in the "joint venture" and by dividing up the different responsibilities of the case, created a conflict of interest which adversely affected their representation. *Baty*, at 397-98. In the present case, when the separate courts against both defendants were divided up by the three attorneys, with each exclusively defending counts relating to both defendants, an actual conflict very similar to that found in *Baty* occurred. Furthermore, when Petitioner indicated she wanted the opportunity to testify on her own behalf as to the old advertisements and certain drug paraphernalia, she was precluded from doing so because if she had testified she would have inculpated her co-defendant. As such, Vaughn's multiple representation of both Petitioner and Moore created an actual conflict of interest in that while he represented Moore on drug paraphernalia charges, he was also advising Petitioner not to testify that certain paraphernalia items belonged to and were used exclusively by Moore. Because Vaughn refused to allow Petitioner to testify against Moore, said evidence was eventually introduced by the state and used against Petitioner to obtain her conviction. As in *Martin*, had Petitioner been able to testify, she may have been able to exculpate herself. As such, she was adversely affected by her attorney's dual representation.

In addition to Vaughn's advice to Petitioner that she not testify, it should have been apparent to Mr. Scalise and Mr. Sandre from the very beginning of the case that Petitioner's and Moore's defenses conflicted to the point their attorneys could not be effective as to one or the other. Scalise could not argue, for instance, that Moore had nothing to do with the operation of Posters without implicating Petitioner. He could not argue that the bong discovered in Petitioner's and Moore's bathroom did not belong to Petitioner without suggesting it belonged to Moore. He could not make the claim that Petitioner was not responsible for the seized advertisements without implicating Moore. These conflicts clearly adversely affected Scalise's performance.

The Eighth Circuit in its opinion affirming the District Court's denial of Petitioner's habeas corpus petition, found no evidence indicating either Scalise or Sandre was aware of any blame shifting between Petitioner and Moore before November of 1990. (App. pp. 6-7). The record clearly shows, however, that at the very first meeting with Scalise, Moore began to minimize his role in the operation of Posters and shift the blame of any wrongdoing to Petitioner. (App. pp. 37, 39, 42, 62-63) (Acty depo at 18, 21, 29) (Sandre depo at 14).

Where one defendant can benefit from seeking to shift blame for guilt to a co-defendant, the attorney has a clear conflict of interest and must withdraw. *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir. 1975). This is precisely the situation that existed between Petitioner and Moore – a situation that was or clearly should have been apparent to Scalise and Sandre from the start of the case. Early in their representation of Petitioner and Moore, Scalise and Sandre were aware of the differing roles each played in Posters' operation and their varied culpability concerning the advertisements and bong. From this knowledge, it can be logically inferred that Scalise and Sandre knew also that Petitioner and Moore could benefit from shifting blame to each other. Despite this knowledge, neither withdrew from their representation of Petitioner and each continued to represent both her and Moore throughout her trial.

The possibility of a conflict of interest was never explained to Petitioner by any of her attorneys. (App. pp. 73, 38-39) (Vaughn depo at 18; Acty depo. at 19, 21). Petitioner never had explained to her the effect such multiple representation could have on the disposition of her case.

Conflict Not Waived, Not Cured

Defense counsel is in the best position to determine when a conflict exists and is obligated to promptly disclose any conflict to the trial court. *Cuyler*, 446 U.S. at 346, 100 S.Ct. at 1717. Here, although Scalise was aware of the conflict created by his multiple representation of Petitioner and Moore (App. p. 54) (Scalise depo. at 22), he never reported that conflict to the Court. (App. p. 56) (Scalise depo. at 28).

The right to separate counsel may be waived, if done so knowingly and intelligently. *Holloway v. Arkansas*, 435 U.S. at 483, 98 S.Ct. at 1178. Courts, however, indulge in every presumption against waiver. *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 465 (1942). Once the attorney determines there is a potential or actual conflict, he must promptly explain to the defendant that there is or may be a conflict. *In re Sedor*, 245 N.W.2d 895, 900 (Wis. 1976). The fact a defendant had the conflict explained to him or her should be made a matter of record. ABA Stds., The Defense Function Std 4-3.5(b)(iii). Here, there was no record made to indicate Scalise, Sandre or Vaughn explained the existence of any conflict to Petitioner. Scalise now maintains that he raised the issue of conflicts with Petitioner, but acknowledges he requested no written waiver from her. (App. p. 51) (Scalise depo. at 11). Whatever conversation he claims to have had with Petitioner, it clearly was not the basis of a knowing and intelligent waiver:

> Usually what you say to them, "If we get into a thing where one of you is going to be a witness against the other, we're going to – you're just going to have to resolve that. That will be a conflict." It's that kind of thing. . . . I told them if we got to the point where there was a conflict, we'd have to sit down and discuss it, make a different arrangement with respect to who represented who. But at that point in time, there wasn't a conflict that I saw. And I wasn't made aware of any conflict. After all, they were married to each other.

(App. pp. 57-58) (Scalise depo. at 49).

Neither Scalise, Sandre, nor Vaughn raised with Petitioner the particular ways in which a conflict might arise in her case. They never explained that her degree of involvement in the operation of Posters versus Moore's could present problems for her down the road. Instead, Scalise suggested it was *her* duty to apprise *him* of any conflicts: "I wasn't made aware of any conflict." (App. pp. 57-58) (Scalise depo. at 49).

Scalise further assumes, though he was aware of their marital discord (App. p. 54) (Scalise depo. at 22), that because Petitioner and Moore were married, conflict was not an issue: "After all, they were married to each other." (App. p. 58) (Scalise depo. at 49). Scalise seems to ignore the fact that because the two were married, the likelihood of a conflict should have been even more apparent. In

People v. Ramsey, 95 Cal. Rptr. 231, 233 (Cal. Ct. App. 1971), the court held "the potential for conflict appears great based upon the husband-wife relationship and the possibility of domination or martyrdom by one or the other. This potential at least should be explored by the defendants with knowledge of their right to separate representation if there is a conflict." "Clearly a lawyer's lack of sensitivity to the existence of a conflict does not bar the court's finding there was a real conflict." *Hanrahan v. Welborn,* 591 F.Supp. 252, 256 (N.D. Ill. 1984), aff'd 774 F.2d 1167, cert. denied, 474 U.S. 1104, 106 S.Ct. 891, 88 L.Ed.2d 925 (1986).

Because neither Scalise nor any of the other attorneys who represented Petitioner properly informed her of the potential and actual conflicts of interest inherent in their dual representation of her and Moore, Petitioner could not and did not effectively waive her right to separate counsel. As a result, their representation of both Petitioner and Moore created an actual conflict of interest which adversely affected their performance. As such, Petitioner was denied her right to effective assistance of counsel under the Sixth Amendment and should be awarded a new trial.

◆

CONCLUSION

For the reasons stated in Issues I and II, Petitioner respectfully requests the Court reverse her conviction, judgment and sentence and remand her case to the District Court for a new trial.

Respectfully submitted,

PARRISH, KRUIDENIER, MOSS, DUNN,
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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1779

United States of America,	*	
Appellee,	*	Appeal from the United
	*	States District Court for
v.	*	the Southern District of
	*	Iowa.
Lana Christine Acty, also known as Chris Acty,	*	
Appellant.	*	

Submitted: November 14, 1995
Filed: March 7, 1996

Before BEAM, HEANEY, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

BEAM, Circuit Judge.

Lana Christine Acty (Acty) appeals the district court's[1] denial of her motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. Sec. 2255. Acty contends she was denied effective assistance of counsel due to her attorneys' conflicts of interest and their adoption of an unreasonable defense to the charges against her. We affirm.

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[1] The Honorable Charles R. Wolle, United States District Court Judge for the Southern District of Iowa.

I. BACKGROUND

In 1977, Acty and her husband (now former husband), George Michael Moore (Moore), formed "Posters 'N' Things, Ltd." (Posters), an Iowa corporation consisting of three component businesses. Subsequently, law enforcement officials began receiving complaints that one of these businesses, a merchandise store, was selling drug paraphernalia. Authorities initiated an investigation, and on March 28, 1990, conducted a search of the merchandise store and of the residence of Acty and Moore. In the raid, officials seized various items of merchandise and several volumes of financial records related to the business.

The following day, Acty and Moore met with attorney Lawrence Scalise (Scalise) in his Des Moines, Iowa, office. Scalise agreed to represent Acty, Moore, and Posters on any criminal or civil charges brought against them. Scalise did not, however, receive a retainer fee from either Acty or Moore at this meeting.

Shortly after this initial meeting, Acty and Moore arranged another appointment with Scalise, this time in Las Vegas, Nevada. The two arranged for Robert Vaughn (Vaughn), an attorney and Executive Director of the American Pipe and Tobacco Council, to attend this meeting. Acty was a member of the American Pipe and Tobacco Council, and Vaughn had regularly advised Acty regarding the various drug paraphernalia laws applicable to the operation of Posters. Vaughn acted as a consultant to Acty and Moore during the Las Vegas meeting. It was at this meeting that Scalise received a retainer for his services from Acty and Moore.

On May 16, 1990, Acty, Moore, and Posters were formally indicted on various offenses related to the sale of drug paraphernalia.[2] In the months following the indictment, Acty and Moore continued to meet with Scalise and, later, also with Scalise's partner, John Sandre (Sandre). During this time, Acty and Moore experienced intermittent periods of marital discord which would occasionally come to the attention of their lawyers. Nevertheless, Scalise and Sandre continued to represent all three defendants until November 1990. At that time, Acty sought alternative counsel in Vaughn.

At a joint jury trial held in December 1990, Vaughn appeared on Acty's behalf, Scalise represented Moore, and Sandre served as counsel for Posters. The attorneys divided some of the tasks of trial preparation and presentation, however, with each attorney accepting primary responsibility for particular charges. At the conclusion of trial, Acty was convicted of each of the nine counts charged against her and was sentenced to 108 months in prison. Acty's conviction was ultimately affirmed in *Posters 'N' Things, Ltd. v. United States*, 114 S. Ct. 1747 (1994).

On July 22, 1994, Acty filed a motion for postconviction relief, claiming she was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the

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[2] Acty was named in nine counts in the indictment, while Moore was named in six of the counts charged.

United States Constitution. The district court denied the requested relief, and Acty appeals. Acty argues that she received ineffective assistance of counsel because her attorneys labored under a conflict of interest due to their dual representation of both Acty and Moore. Acty further alleges that her first attorney's reliance on an "advice of counsel" defense to the charges against her constituted ineffective assistance of counsel.

II. DISCUSSION

A. Conflict of Interest

The Sixth Amendment right to counsel embraces the right to representation that is free from conflicts of interest or divided loyalties. *See, e.g., Dawan v. Lockhart,* 31 F.3d 718, 720-21 (8th Cir. 1994) (subsequent history omitted). Conflicts may arise when an attorney simultaneously represents clients with differing interests. *Salam v. Lockhart,* 874 F.2d 525, 527 (8th Cir.), *cert. denied,* 493 U.S. 898 (1989). Nevertheless, joint representation of codefendants by a single attorney is not per se violative of a defendant's right to effective assistance of counsel. *Dokes v. Lockhart,* 992 F.2d 833, 836 (8th Cir. 1993), *cert. denied,* 115 S. Ct. 437 (1994). Instead, in order to establish a constitutional violation due to conflict of interest, a defendant who fails to make a timely objection to her counsel must demonstrate that "an actual conflict of interest adversely affected [her] lawyer's performance." *Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980). Until a defendant shows that her counsel "actively represented conflicting interests, [she] has not established the constitutional predicate for [her] claim of ineffective assistance." *Id.*[3] at 350.

In determining whether a defendant has satisfied her burden under *Cuyler,* we employ two separate standards of review. We engage in a de novo review of ineffective assistance claims, which present mixed questions of law and fact, but we review the district court's underlying findings of historical fact for clear error. *Battle v. Delo,* 19 F.3d 1547, 1552 (8th Cir. 1994) (subsequent history omitted).

1. Pretrial Representation

Acty contends that her attorneys had an actual conflict of interest at various stages in the criminal proceedings against her. Initially, Acty argues that from the outset of Scalise's representation of Acty and Moore,

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[3] Under *Cuyler,* the mere potential for a conflict is insufficient to demonstrate a violation of a defendant's Sixth Amendment rights. *Cuyler,* 446 U.S. at 350. A potential conflict of interest may, however, form the basis of an ineffective assistance of counsel claim under the two-pronged test of *Strickland v. Washington,* 466 U.S. 668 (1984). *See Pool v. Armontrout,* 852 F.2d 372, 375 (8th Cir. 1988), *cert. denied,* 489 U.S. 1023 (1989). ("Absent an actual conflict of interest, Pool must establish that his counsel was ineffective under the two-pronged *Strickland* test."). A defendant asserting a *Strickland* claim of ineffective assistance due to a potential conflict would receive relief only "by showing both that (1) [her] attorney had a potential conflict of interest and (2) the potential conflict prejudiced [her] defense." *Stoia v. United States,* 22 F.3d 766, 770 (7th Cir. 1994). In this case, Acty has elected to proceed only under *Cuyler,* and therefore we do not consider any alternative *Strickland* claim.

Moore began to minimize his own role in the operation of the merchandise store and to shift blame to Acty. Acty asserts that this representation, along with the couple's marital difficulties, gave rise to competing interests between the two defendants. According to Acty, Scalise's continued representation of both defendants in the face of this conflict compromised Acty's interests during the preparatory stages of the criminal proceedings, particularly during preliminary plea discussions with the government.

We have recognized that where different defenses are offered by two codefendants, and particularly "where one defendant attempts to exonerate himself by pointing the finger of guilt at codefendants," a conflict of interest can arise. *Parker v. Parratt*, 662 F.2d 479, 484 (8th Cir. 1981), *cert. denied*, 459 U.S. 846 (1982). We disagree, however, that an actual conflict of interest existed during the pretrial stages of this case.

The district court found that Acty and Moore acted as a team during the beginning phase of the proceedings against them. The two were unified in their defense throughout the early pretrial stages, each declaring that they lacked the intent to sell drug paraphernalia, believing the items in their store would be used for legitimate purposes. While it is evident the couple was experiencing marital difficulties at that time, nothing in the record indicates that the marital problems were related to disagreements over either party's responsibility for the operation of the store or over trial strategy. Moreover, both Scalise and Sandre testified at the hearing on Acty's section 2255 motion that they did not believe a conflict of interest existed between the two codefendants during the early stages of the case. The district court properly credited this testimony, recognizing that "[a]n 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists. . . . ' " *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978), (quoting *State v. Davis*, 514 P.2d 1025, 1027 (Ariz. 1973)). Given these facts, we fail to see an actual conflict during this period.

A potential conflict did eventually begin to develop as the trial approached. In approximately November 1990, Moore began to minimize his role in the operation of the merchandise store. This potential conflict was promptly resolved by Scalise and Sandre, however, when they immediately informed Acty that they would no longer be able to represent both Acty and Moore and advised her to seek alternative counsel. We are satisfied that these actions adequately addressed the developing tensions between the codefendants before an actual conflict could affect the representation.

Assuming, for the sake of argument, that Acty had demonstrated an actual conflict, we are convinced that the conflict of interest did not have an adverse effect on the performance of Acty's attorneys. Acty contends that the conflict stifled the amount of information that Scalise and Sandre imparted to her regarding her potential punishment under the sentencing guidelines. She also argues that the conflict affected the aggressiveness with which her attorneys pursued potential plea agreements on her behalf. After carefully reviewing the record, we find Acty's assertions to be without merit. First, the district court found that Scalise did indeed explain the sentencing guidelines to Acty, a finding adequately supported by

Scalise's correspondence with the government regarding sentencing calculations. Second, nothing in the record indicates that Acty was excluded from the plea negotiation process. Some of the preliminary plea correspondence between Scalise and the government was written with specific reference to Moore, while other correspondence addressed both defendants. None of the preliminary negotiations, however, were ever concealed from Acty. To the contrary, the record supports the district court's finding that each of the preliminary plea proposals was discussed with both defendants, and that both rejected the proposals because they would involve prison sentences. On this record, Acty has failed to show how her attorneys would have performed differently had they not been affected by the alleged conflict of interest.

In short, Acty has not satisfied either prong of the Cuyler test. Therefore, we find that Acty was not denied her Sixth Amendment right to effective assistance of counsel during the pretrial stages of her prosecution.

2. Representation of Acty at Trial

Acty also contends that an actual conflict of interest infected Vaughn's representation during the trial of her case. According to Acty, a conflict of interest was created by Vaughn's contact with Moore[4] and by Vaughn's agreement with Scalise and Sandre to divide work on the issues in the case. This conflict, Acty argues, colored Vaughn's advice to Acty that she not testify in her own defense at trial.

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[4] Throughout the early stages of the criminal proceedings, Moore had sent letters to Vaughn asking questions regarding the status of the defense. One letter reached Vaughn after Vaughn entered his appearance as attorney for Acty.

Nothing in the record supports Acty's assertions that Vaughn's advice against testifying was the result of an actual conflict of interest. The district court found that Vaughn had secured the suppression of evidence prejudicial to Acty's case, and that he advised Acty not to testify out of concern that her testimony would open the door to presentation of this evidence on cross-examination. The court below also found that Vaughn believed Acty's testimony would be of little benefit to her defense. These findings are not clearly erroneous and in fact are amply supported in the record.

Neither Moore's letters to Vaughn nor Vaughn's cooperation with Scalise and Sandre compels the conclusion that Vaughn's advice was motivated by an actual conflict. Moore's communications with Vaughn were one-sided, and simply fail to establish that Vaughn's loyalties were in any way divided between Acty and Moore. While the division of labor between the three attorneys certainly required a degree of cooperation between them, communication by separate counsel in a joint trial does not necessarily create an actual conflict of interest. Nor is there any evidence that this particular agreement between the attorneys created a conflict for Vaughn.[5]

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[5] The agreement between the attorneys did not, for example, include a provision that the attorneys refrain from pursuing a line of questioning if it would be detrimental to a codefendant. To the contrary, the trial transcript indicates that each attorney was free to, and indeed did, take the opportunity

Accordingly, we find that Vaughn's trial representation was not clouded by an actual conflict of interest, and that Acty is not entitled to relief under Cuyler.

B. "Advice of Counsel" Defense

As her second ground for relief from her conviction, Acty contends that Scalise provided ineffective assistance of counsel by pursuing an "advice of counsel" defense to the drug paraphernalia charges alleged in the indictment. Scalise proposed to develop the defense at trial by offering evidence that Acty relied heavily on Vaughn's advice regarding the scope of the drug paraphernalia laws applicable to her business. In fact, prior to Acty's decision to retain Vaughn as trial counsel, Scalise had planned to call Vaughn as a witness to attest to his frequent advice to Acty during the operation of her business.

According to Acty, Scalise's error in relying on the "advice of counsel" defense was twofold. First, the defense was faulty because Vaughn advised Acty only in his capacity as Executive Director of the American Pipe and Tobacco Council and not as her retained attorney. Second, the defense was designed to establish Acty's lack of subjective intent to violate the drug paraphernalia statute, a factor which became irrelevant when the trial judge ruled that the statute required only objective

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to ask questions and make objections on behalf of his client at any time during the trial regardless of whether that attorney had primary responsibility for the particular charge at issue.

scienter.[6] Acty asserts that Scalise's focus on this defense, to the exclusion of others, rendered his representation constitutionally ineffective.

To succeed in this ineffective assistance claim, Acty must establish: "first, [her] counsel's assistance fell below an objective standard of reasonableness in that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would use under like circumstances; and second, that the deficient performance prejudiced [her] defense." *Battle,* 19 F.3d at 1554 (citing *Strickland,* 466 U.S. at 687). In *Strickland,* the Supreme Court stated that in order to establish prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. More recently in *Lockhart v. Fretwell,* 113 S. Ct. 838 (1993), however, the Supreme Court admonished that the prejudice prong encompasses more than mere outcome determination. Rather, the ultimate focus of the question of prejudice is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Id.* at 844.

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[6] At the time of the trial, the question of whether the statute under which Acty was charged contained a subjective scienter requirement or an objective scienter requirement was widely debated. *See United States v. Posters 'N' Things, Ltd.,* 969 F.2d 652, 656-57 (8th Cir. 1992), *aff'd,* 114 S. Ct. 1747 (1994). On November 8, 1990, approximately one month before trial, the trial court entered an order in Acty's case ordering that the prosecution would be required to establish only objective scienter on the part of Acty and Moore. On direct appeal, this court held that the statute contained an objective scienter requirement. *Id.* at 657-58. The United States Supreme Court ultimately adopted this determination.

Under these standards, we find that Acty has failed to demonstrate Scalise's use of the "advice of counsel" defense constituted ineffective assistance of counsel. The defense was a professionally reasonable one at the time of trial in light of the split in authorities over the statute's intent requirement. Furthermore, although the trial court made a pretrial ruling that the prosecution was required to prove only objective intent, the court nevertheless explicitly refused to foreclose use of the "advice of counsel" defense by the defendants. As in any ineffective assistance claim, we must resist the temptation to engage in a hindsight evaluation of a defense attorney's tactics. *See Strickland*, 466 U.S. at 689. Scalise's strategy in developing the "advice of counsel" defense was a reasonable strategy developed after professionally adequate research of the law as it stood at the time of Acty's case.

Even if we concluded that Scalise's decision to develop the "advice of counsel" defense was deficient, we would still reject Acty's claim due to the lack of evidence that prejudice resulted from Scalise's decision. Acty argues that if Scalise had not focused on the "advice of counsel" defense he would have cultivated other defenses and the outcome of her case would have been different. This assertion is not only entirely speculative, it is completely unsupported by the record. The record reveals that the government had a solid case against Acty to which few defenses could be mounted. Because there was never a question that Acty sold the items which were eventually found to be drug paraphernalia, Acty's attorneys necessarily grounded her defense on her knowledge of the various uses of the items and her intent in selling them. Although Acty believes her best defense would have been to shift blame to Moore, such a strategy would have yielded her little in this case. Acty has suggested no other defenses, and we can think of none, which would have changed the outcome of her proceedings. Thus, Acty has not met her burden of showing that, but for Scalise's strategic choices, the result of her proceedings would have been different. Nor has she demonstrated that Scalise's strategy rendered the proceedings fundamentally unfair or unreliable. Accordingly, Acty has failed to establish that Scalise's "advice of counsel" defense violated her Sixth Amendment right to effective assistance of counsel.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff-Respondent,	)))	CRIMINAL NO 90-33
vs.	)	ORDER
LANA CHRISTINE ACTY, a/k/a CHRIS ACTY, Defendant-Movant.	))))	(Filed Mar. 9, 1995)

Before the court is defendant Lana Christine Acty's motion to vacate, set aside, or correct her sentence pursuant to Title 28, United States Code, Section 2255. She seeks a new trial of the criminal charges that resulted in a jury trial and her conviction and sentence to imprisonment and payment of substantial fines, with property forfeited to the government.

The court denies the motion for relief from the judgment and sentence this court imposed.

BACKGROUND

In December of 1990, a jury returned a verdict of guilty on charges that Acty violated several federal criminal statutes, including 21 United States Code Sections 841(a)(1), 854; former section 857(a)(1); and 18 United States Code Sections 371, 1956(a)(1), 1957. Her codefendant George Michael Moore was also found guilty of the charges, but he did not appear for sentencing and has still not been apprehended since he violated his conditions of bond. The corporation they both were operating was also found guilty of several criminal charges. The Court of

Appeals for the Eighth Circuit and the United States Supreme Court affirmed the convictions. *United States v. Posters 'N' Things, Ltd.*, 969 F.2d 652 (8th Cir. 1992), *aff'd*, 114 S. Ct. 1747 (1994).

Acty filed this motion on July 22, 1994, and then amended the motion on September 20, 1994, and made additional arguments in her proposed rulings filed on October 14, 1994. The court held an evidentiary hearing on the motion and has now examined the entire record, including the exhibits received during the hearing, the testimony presented during the trial and in depositions received in evidence, and the testimony presented at the hearing on the motion. The court will first summarize Acty's and the government's responses. The court will then set forth the pertinent facts and the principles of law governing each of the grounds of Acty's motion.

I. Acty's Arguments.

Acty's many arguments can be summarized as follows:

> She contends the three lawyers who represented her before and after trial were constitutionally ineffective; she contends her lawyers had a conflict of interest and did not inform her or the court of the conflict.
>
> She alleges she was not informed of her right to have her own lawyer, and she disputes counsel's testimony that she knowingly waived her right to separate counsel.
>
> She contends her lawyers Lawrence Scalise and John Sandre should have understood her best

defense would be to shift the blame to her codefendant, and therefore they should not have represented her husband as well as herself.

She contends the conflict of interest so affected Scalise's performance that she was forced to obtain alternate counsel midway through her preparation for trial.

She contends her attorneys should have realized they had a conflict of interest and should have withdrawn and not represented her or her codefendants during the trial.

She contends Scalise entered into plea negotiations only for her codefendant Moore and not on her behalf, then failed to keep her informed about the plea negotiations.

She contends that her counsel should have advised her to enter a guilty plea, without admitting guilt, pursuant to *North Carolina v. Alford,* 400 U.S. 25 (1970).

She contends that because of the conflict of interest her attorneys Scalise and Sandre did not adequately investigate the case or retain expert witnesses that would support an advice-of-counsel defense.

She contends her attorney Robert Vaughn also had a conflict of interest because he should have testified to support her advice-of-counsel defense, and his conflict affected her right to testify in her own defense.

She contends all of her lawyers provided her ineffective assistance because they did not act exclusively as her separate counsel and did not accurately inform her concerning the law that was later pronounced by the trial court, the

> court of appeals, and United States Supreme Court.
>
> She contends Vaughn's representation was flawed because he did not challenge an aiding and abetting conviction on appeal, he advised she should continue to operate her business while the appeal was pending, and he improperly advised her on the way to run her business both before and during the trial.

II. The Government's Response.

In response, the government makes the following arguments:

> The government states that counsel had no conflict of interest and, if there was a potential conflict, the conflict did not cause Acty harm and did not rise to the level of ineffective assistance of counsel.
>
> The government contends her counsel did challenge the aiding and abetting conviction on appeal.
>
> The government contends Acty has not explained what exculpatory evidence counsel would have obtained with further investigation.
>
> The government contends the evidence presented by Acty does not demonstrate she was denied a fair trial in any respect.

III. Facts Concerning Conflict of Interest:

The facts concerning Acty's claim of conflict of interest fall into five separate categories:

Counsel's investigation and preparation for trial;

Counsel's advice concerning plea discussions;

Counsel's advice concerning an advice-of-counsel defense;

Potential expert witnesses; and

Counsel's advice not to testify.

The court will address each in turn.

A. Facts Concerning Counsel's Representation and Investigation. The day after the search of their home and business, Acty and Moore met with Scalise. Scalise agreed to represent Acty, Moore, and Posters 'N' Things, though he was not officially retained as counsel then. (Ex. 1; Acty Depo. at 16; Scalise Depo. at 5.)

Although Acty denies Scalise, Sandre, or Vaughn ever told her anything about a conflict of interest between the defendants, (Acty Depo. at 18-20, 26, 37), the court concludes Scalise orally informed Acty early in the relationship as part of his general procedure that if a conflict arose he would discuss it with the defendants and the defendants would have to resolve it. (Scalise Depo. at 11-12.) Sandre also was present at discussions with the parties regarding a potential conflict of interest. (Sandre Depo. at 11, 41.)

Sandre felt there was no conflict so strong that counsel could not represent both Moore and Acty. (Sandre Depo. at 28.) Scalise felt there was not conflict in the defenses of the three defendants. (Scalise Depo. at 45.) Although Vaughn saw an obvious conflict between the three defendants, (Vaughn Depo. at 18), he agreed the defense of showing Acty did not have the requisite knowledge was consistent among the defendants. (Vaughn Depo. at 44.)

During the first week of April of 1990, Acty, Moore, Scalise, and Vaughn met in Las Vegas. Vaughn was the executive director of the American Pipe and Tobacco Council and provided legal advice on drug paraphernalia laws to members of the organization. (Vaughn Depo. at 35.) Acty was a member of the organization. (Vaughn Depo. at 8.) She and Moore were in Las Vegas to attend a conference of the American Pipe and Tobacco Council.

Vaughn was a consultant in the case beginning at the Las Vegas meeting. (Vaughn Depo. at 12, 46.) During the meeting Acty or Moore gave Vaughn a token one dollar retainer to establish an attorney-client relationship so they could discuss the case in confidence. (Vaughn Depo. at 11-12, 46.) Vaughn was under criminal investigation in a separate case, and he sought the retainer agreement to avoid disclosure of his files. (Vaughn Depo. at 12-13.) Vaughn also felt he could not take on new clients while he was a target of criminal charges himself. (Vaughn Depo. at 13.) He continued, however, to act as executive director of the American Pipe and Tobacco Council. (Vaughn Depo. at 13.) He did not recall whether he counseled Acty between the Las Vegas meeting and the May, 1990, indictment. (Vaughn Depo. at 14.) Sandre believed Acty received advice from Vaughn long before Vaughn filed his appearance. (Sandre Depo. at 17.)

During the Las Vegas meeting Scalise accepted $5,000 as a retainer for his services for the three defendants.

(Acty Depo. at 17.) It was not Scalise's practice to provide a written letter of retainer.

At the early stages of the proceedings Acty and Moore were "100 percent unified" in their defense. (Sandre Depo. at 14.) On June 22, 1990, Moore wrote Vaughn and stated he believed the "plan" was for Scalise to represent him and Vaughn to represent Acty and Posters 'N' Things. (Ex. 4 "Larry represents me, & you, Chris & Corp. Is this the way you plan").) Moore also asked Vaughn to "FAX" to Acty any information Vaughn sent Moore. From the letter it is clear Moore believed the attorneys were working together.

Although Acty contends counsel should have known of a conflict between herself and Moore because of their marital discord, the court finds counsel should not have known a conflict existed simply because of Acty's marital discord. Scalise, Sandre, and Vaughn knew Acty and Moore had arguments, but they did not know if the problems were related to trial preparation. (Sandre Depo. at 29; Scalise Depo. at 22; Vaughn Depo. at 31.) It is reasonable to infer the indictment and trial could create some tension in Acty and Moore's relationship. However their marital difficulties also could have been wholly unrelated to the criminal charges.

Later, in the fall, Moore informed counsel that Acty had greater control of the business than he did. (Sandre Depo. at 14.) Sandre felt the conflict arose "gradually," and at first Acty did not really disagree with Moore's statements about his involvement in the business. (Sandre Depo. at 15.)

Scalise met with Acty and told her she needed to have her own counsel. (Scalise Depo. at 22-23.) Acty denies she had such a conversation with counsel; rather, she contends Moore told her of the conflict and told her to get another attorney. (Acty Depo. at 28, 29, 35.)

Scalise did not withdraw from representing Moore, nor did Scalise feel a conflict of interest existed in continued representation of Moore. (Scalise Depo. at 23-24; Acty Depo. at 31.) Until Acty retained Vaughn, Scalise did not separate the work his firm did for Acty as opposed to Moore. (Scalise Depo. at 9.) Scalise felt his firm represented Acty, Moore, and Posters 'N' Things until Vaughn formally entered the case. (Scalise Depo. at 39.)

Vaughn appeared on Acty's behalf on November 17, 1990. When Vaughn entered the case there was a conversation among Vaughn, Scalise, and Sandre to discuss who would represent whom. They decided Sandre would represent the corporation; Scalise would represent Moore; and Vaughn would represent Acty. (Vaughn Depo. at 18.) The parties explained this to the trial judge on the first day of trial, and Acty did not object. Vaughn saw potential conflicts among the two individual defendants and the corporation, but he believed there was no conflict on the question whether Acty had the requisite knowledge to commit the offense. (Vaughn Depo. at 44.)

Despite what the attorneys told the trial judge on the first day of trial, they also divided their workload by having each lawyer focus on particular charges. (Acty Depo. at 31-32; Sandre Depo. at 24; Vaughn Depo. at 31.) Counsel did not tell the court this might create a conflict of interest, but the court realized counsel had divided the work by issue and this did not create a conflict of interest that prejudiced any defendant.

According to Scalise it was "apparent" at trial that Vaughn "spent a lot of time investigating the defenses . . . even before he filed his appearance." (Scalise Depo. at 46.) Vaughn did not discuss with Scalise or suggest continuing trial in order to permit further investigation. (Scalise Depo. at 53.) Vaughn was not involved in the pretrial legal research to determine the mental state required for guilt on the charges in the Indictment. Although Vaughn recalled that Assistant United States Attorney Lester Paff believed the court had decided it would use an objective mental state, Vaughn got the impression from Scalise that the court had not made a decision and Vaughn did not see pretrial orders suggesting the test was objective and not subjective. (Vaughn Depo. at 43.) In fact, Scalise's law firm filed a motion and brief on the issue, and the court ruled November 8, 1990, that the drug paraphernalia law required only an objective and not subjective intent. (Filing #61; Sandre Depo. at 45-46.)

Vaughn had responsibility to file any notice of appeal on Acty's behalf. (Sandre Depo. at 49.) Acty hired Vaughn for her direct appeal. At Vaughn's request, and with no objection from Acty, Sandre prepared the brief on money laundering issues.

B. Facts Concerning Plea Discussions and Sentencing Guidelines. The government never made a formal plea offer to either Moore or Acty. No conflict of interest existed when preindictment plea discussions took place in late April and early May of 1990. (*See* Exs. 5 & 6.) On

May 8, 1990, Scalise spoke for both Acty and Moore when he rejected the proposed arrangement that would have required Acty and Moore both to serve approximately six years in prison. (Ex. 6.)

On May 31, 1994, the government responded to Scalise's request to pursue plea negotiations on behalf of Moore. (Ex. 7.) The government's letter discusses the possibility of Moore as a witness in the case but does not mention Acty. After receiving no response from Moore on the proposal, the government advised Scalise that if Moore did not return the letter by June 15, 1990, the government would consider the May 31, 1990, letter void.

Acty recalled hearing about a letter the government sent to Moore, prior to Sandre's entry into the case. Then the government had supposedly proposed a three-year sentence for Moore. (Acty Depo. at 23-24.) Acty contends she heard of no further plea discussions regarding Moore or herself until she initiated this section 2255 motion. (Acty Proposed Ruling at 14; Acty Depo. at 24.) After Vaughn entered the case, Sandre and Vaughn discussed a proposal in which Acty would plead guilty to a felony charge and receive a lesser sentence than she ultimately received. Sandre conveyed the proposal to Moore but did not present it to Acty because at that time Sandre did not represent Acty. (Sandre Depo. at 52.) The court finds the only real plea proposal was that set forth in the letters from government counsel. Vaughn testified credibly that he conveyed the plea proposal to Acty, who adamantly responded she was not guilty and would not plead guilty. Vaughn believed Acty would not plead guilty to a charge requiring a prison term. (Vaughn Depo. at 34-35.) Scalise believed Acty could not plead guilty unless she made an

Alford plea. (Scalise Depo. at 42-43.) The government never offered and had no interest in such a proposal.

Although Vaughn did not discuss the sentencing guidelines with Acty prior to her conviction, (Vaughn Depo. at 29), Scalise explained the applicable sentencing guidelines to Acty. Scalise's May 8, 1990, letter in response to the government's preliminary sentencing calculations indicates he discussed the proposal with Acty and Moore, and neither were interested in it. (Exs. 5 & 6.)

Acty was not interested in entering into a plea agreement as early as May of 1990 and as late as November of 1990. She did not believe she was guilty of the crimes charged and she would not have pleaded guilty.

C. Facts Concerning the Advice-of-Counsel Defense. Initially, counsel planned for Vaughn to testify as an expert witness to support an advice-of-counsel defense. (Acty Depo. at 34.) Scalise felt Acty's best and only defense was an advice-of-counsel defense, that Vaughn was the counsel who gave the advice, and that Moore also could benefit from the defense. (Scalise Depo. at 10, 23, 26, 46.) Sandre also felt this was a sound defense. (Sandre Depo. at 48.)

Scalise advised Acty it was a mistake to use Vaughn as her lawyer rather than as a witness in an advice-of-counsel defense. (Sandre Depo. at 22; Scalise Depo. at 23, 44-45.) Sandre agreed. (Sandre Depo. at 22, 49.) Although Acty denies the conversation occurred, it did take place. (Acty Depo. at 35.)

Scalise knew Acty had been talking to Vaughn quite a lot, all during the case. (Scalise Depo. at 10, 22, 36, 44, 52, 56.) Vaughn knew Acty was aware prior to trial of the objective versus subjective intent issues. (Vaughn Depo. at 38.) Vaughn felt his expert testimony as part of an advice-of-counsel defense was problematic because there was a question as to whether he was her counsel. Vaughn had discussed the law with Acty but did not discuss it as her "attorney." (Vaughn Depo. at 40.) Acty spoke with Vaughn about products she sold, but she denied discussing the defense of her criminal case with him before he appeared as her counsel. (Acty Depo. at 45-46.)

After Vaughn entered the case counsel obtained Judd Golden as a witness for the advice-of-counsel defense. (Scalise Depo. at 35.) Golden had acted as the defendants' lawyer early in the operation of the defendants' business. (Scalise Depo. at 35-36, 44-45; Sandre Depo. at 48-49; Ex. 11.) The trial court entered an order on December 5, 1990, precluding defendants from raising an advice-of-counsel defense during the government's case in chief but giving defendants the opportunity to renew the defense after the government rested. (Filing #71; Sandre Depo. at 47.)

D. Facts Concerning Potential Expert Witnesses. During trial, Acty presented effective testimony in cross-examination of government witness to establish that other stores in Des Moines, in Iowa, and in other parts of the United States also sold at retail most of the items she sold in her store. Defendants plainly did prove that many of the items Acty sold were being sold by other stores that had not been charged with violations of drug paraphernalia laws. The government's response to that testimony was the forceful argument that Acty and her codefendants gathered all paraphernalia and related items together so persons trafficking in drugs could conveniently purchase all their needed materials at her store. Expert witnesses on the subject would not have changed the complexion of the case nor the essence of the testimony concerning retail sales of items that were the subject of the charges in the Indictment.

E. Facts Concerning Advice Not to Testify. Acty never alerted the court that she wanted to testify until she filed this section 2255 motion. (Acty Depo. at 33.) Although Acty now states she wanted to testify, Vaughn advised her not to testify because he believed this would open the door to presentation of highly prejudicial evidence on cross-examination, including evidence about residue of an illegal drug on a bong that police seized from her home. (Acty Depo. at 33; Vaughn Depo. at 30.)

Acty wished to testify and deny her involvement with the "cocaine kit" advertisements, but Vaughn believed that evidence was stale and not harmful to her defense. (Vaughn Depo. at 30.) Acty never told Scalise that she did not prepare or distribute the cocaine kit literature, (Acty Depo. at 22-23), and Scalise believed the advertisements created no conflict of interest for him. (Scalise Depo. at 58-62).

CONCLUSIONS OF LAW

Acty's claims are properly before this court. *See United States v. Scott*, 26 F.3d 1458, 1467 (8th Cir.), *cert. denied*, 115 S. Ct. 584 (1994). For the following reasons, however, Acty has not established that she is entitled to the relief she seeks.

I. Conflict of Interest.

Under the Sixth Amendment a defendant is entitled to conflict-free counsel. *Dawan v. Lockhart,* 31 F.3d 718, 720-21 (8th Cir. 1994). A defendant who has not notified the court of her counsel's conflict of interest may demonstrate ineffective assistance of counsel in two ways. *See Stoia v. United States,* 22 F.3d 766, 770 (7th Cir. 1994). A defendant may show under *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984), that counsel had a potential conflict of interest and the potential conflict prejudiced the defense. Or, a defendant may show under *Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980), that an actual conflict existed and the conflict had an adverse effect on the lawyer's performance. *See Dawan,* 31 F.3d at 721.

Reversal is automatic if the trial court failed to investigate a conflict of interest after a party made a timely objection or if the trial court knew or reasonably should have known of the conflict. But where a trial court neither knew nor should have known of a conflict of interest and a defendant did not timely object concerning the conflict, the defendant "must demonstrate actual conflict and an adverse effect on the representation." *Id.* (citing *Cuyler,* 446 U.S. at 335). The defendant must show an actual, not potential, conflict. *Id.*

The adverse effect standard is not as high as the prejudice requirement *Strickland* requires to establish ineffective assistance of counsel. *See Dawan,* 31 F.3d at 721; *Stoia,* 22 F.3d at 770-71. A conflict exists when an attorney is put in a situation conducive to divided loyalties. *Smith v. Lockhart,* 923 F.2d 1314, 1320 (8th Cir. 1991). "An adverse effect occurs, if, but for the attorney's actual conflict of interest, there is a '[reasonable] likelihood that counsel's performance somehow would have been different.' " *Stoia,* 22 F.3d at 771 (citations omitted).

A. Representation and Investigation. Acty argues the court should have recognized the conflict attorney Vaughn brought to the case when he appeared for her. At that time, Vaughn was her counsel of record but she was still paying Scalise to be her attorney and she was still speaking with Moore. The court did not know about any conflict of interest at the time, nor should the court have known of the conflict. The court now concludes Acty has not demonstrated any actual conflict of interest adversely affected her during the attorneys' presentation of the defense for the three defendants.

Counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 488 U.S. at 690-91. The court finds no evidence that Acty's attorneys were deficient in investigating the charges, much less that their investigation was impeded by a conflict of interest. Other than her general claim of conflict of interest, Acty has not specified how, if at all, a conflict of interest impeded investigation. Moreover, judicial scrutiny of counsel's performance "must be highly deferential." *Id.* at 689. Acty has not established that her attorneys did not adequately investigate the circumstances of her case.

B. Plea Discussions and Sentencing Guidelines. Criminal defendants do not have a right to have the government offer a plea agreement. *Weatherford v. Bursey,* 429 U.S. 545, 561 (1977). Criminal defendants do have a right to effective assistance of counsel in deciding whether to accept or reject a plea agreement that has been offered. *See Toro v. Fairman*, 940 F.2d 1065, 1067 (7th Cir. 1991) (collecting cases), *cert. denied*, 112 S. Ct. 3038 (1992). A defendant's self-serving statement, standing alone, is insufficient to establish prejudice under the *Strickland* standard. *See Toro*, 940 F.2d at 1068; *Turner v. State of Tennessee*, 858 F.2d 1201, 1206 (6th Cir. 1988) (finding objective evidence that defendant would have taken the plea offer if counsel's advice had been reasonable), *vacated and remanded on other grounds*, 492 U.S. 902 (1989).

Acty has not proved any lawyer's conflict of interest adversely affected her discussion with her counsel concerning potential plea agreements between Acty and the government. Despite Acty's contentions that Scalise gave her only cursory explanation of potential offers, Scalise and Vaughn did present to her the possible guilty plea options. She was not interested. The court finds not credible her uncorroborated testimony stating she would have accepted a plea offer that required her to admit guilt. (Acty Depo. at 48.) Although Scalise believed Acty might have entered an *Alford* plea, (Scalise Depo. at 42-43), the government did not offer an *Alford* plea and nothing suggests the government would have proffered an agreement calling for an *Alford* plea.

C. Advice-of-Counsel Defense. Acty argues a conflict of interest precluded an advice-of-counsel defense. She does not explain how a conflict of interest precluded this defense. The court left open the opportunity to present an advice-of-counsel defense. Judd Golden was available to testify as part of the defense and did testify about advice he had given her several years earlier concerning the lawfulness of her retail sales of products. This argument, too, is without merit.

D. Potential Expert Witnesses. Acty argues a conflict of interest adversely affected her ability to present expert witness testimony about the alternative uses of the items she sold and about businesses similar to her own. Acty does not specify how a conflict of interest adversely affected her ability to present this testimony. She does not demonstrate just what any particular expert witness would have opined nor that the testimony would have been admissible. Her argument is without merit.

Aside from her conflict of interest argument, Acty also argues counsel was ineffective under the *Strickland* standard for failing to present expert witness testimony about the alternative uses of the items she sold and about businesses similar to her own. To show prejudice under the *Strickland* standard for failure to call witnesses, a defendant must show the witnesses would have testified at trial and the testimony would have been favorable to the defendant. *Lawrence v. Armontrout,* 900 F.2d 127, 130 (8th Cir. 1990). A defendant who does not call witnesses to testify at a postconviction hearing should explain their absence and show, with some precision, what their testimony would have been at trial. *Lawrence,* 900 F.2d at 130. Acty has not shown who would have testified or what their testimony would have been. Equivalent testimony was developed in cross-examination of government witnesses. Her argument based on *Strickland* standards is also without merit.

E. Advice Not to Testify. Criminal defendants have a constitutional right to testify on their own behalf.

Rock v. Arkansas, 483 U.S. 44, 49 (1987); *El-Tabech v. Hopkins*, 997 F.2d 386, 388 (8th Cir. 1993). While only the defendant may knowingly and voluntarily waive the right to testify, counsel may and often should advise a defendant against testifying. *See United States v. Teague*, 953 F.2d 1525, 1532-33 (11th Cir.) (en banc), *cert. denied*, 113 S. Ct. 127 (1992). While the subject of some debate, during trial the court does not have an affirmative duty to inquire whether a defendant knowingly and voluntarily waives his right to testify. *El-Tabech*, 997 F.2d at 388 & n.3. A defendant may not "indicate at trial his apparent acquiescence in his counsel's advice that he not testify, and then later claim that his will to testify was 'overcome.' " *United States v. Bernloehr*, 833 F.2d 749, 752 (8th Cir. 1987).

The court concludes Acty waived her right to testify. She never indicated to the court she wished to exercise her right to testify. Moreover, her attorney Vaughn did not labor under a conflict of interest in advising her to not testify, nor was her representation adversely affected by Vaughn's advice. Vaughn was concerned about evidence that police seized from her own home a water pipe with marijuana residue. Although she denies ownership, the jury reasonably could have inferred that she had joint possession of the water pipe. Vaughn did not labor under a conflict of interest in informing Acty it was in her best interest not to testify.

II. Ineffective Assistance of Counsel.

Courts presume counsel was constitutionally effective. *Strickland*, 466 U.S. at 690. To prevail on a claim that counsel was ineffective, defendant must show that (1) counsel's representation was deficient, and (2) the deficiency prejudiced defendant's defense. *Id.* at 687. The court need not address both components of the inquiry if defendant makes an insufficient showing on one of the prongs. *Id.* at 697. In order to establish prejudice, a defendant must show "counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell,* 113 S. Ct. 838, 844 (1993); *Battle v. Delo,* 19 F.3d 1547, 1554-55 (8th Cir. 1994).

A. Advice-of-Counsel Defense. Acty contends Scalise was ineffective in suggesting an advice-of-counsel defense. Scalise was not ineffective in advising her on that matter.

No conflict of interest impeded Acty's ability to present an advice-of-counsel defense. The defense, if presented, might have benefitted all three defendants and prejudiced none of their defenses. In fact the court left open Acty's option to present the defense after the government rested. She chose not to testify and thereby made presentation of the defense impractical.

B. The Aiding and Abetting Conviction. Acty argues Vaughn was ineffective in failing to challenge her conviction for aiding and abetting the manufacture and distribution of cocaine. Vaughn did challenge on appeal her conviction for aiding and abetting. *See Posters,* 969 F.2d at 654. This argument is entirely without merit.

C. Advice on Running the Business. Vaughn admits that hindsight teaches he gave incorrect advice in stating the paraphernalia law required a subjective intent.

But the law propounded by the court of appeals and then by the United States Supreme Court was not clearly established at the time of trial. Vaughn's advice, under the circumstances, was not constitutionally deficient.

Vaughn's advice to Acty to continue the business while her appeal was pending did not affect her conviction or presentation of her case on appeal. This argument is also without merit.

SUMMARY

Upon review of the entire record in this long-running drug-paraphernalia drama, the court concludes that Lana Christine Acty has not established any basis for a second jury trial or other relief. Acty's counsel acted as reasonably competent lawyers in preparing for trial, advising her concerning her rights, and vigorously defending her during the hard-fought jury trial and post-trial appeals. Her defense was not adversely affected by any potential conflict of interest involving the three defendants and the three lawyers who appeared for them. Acty is not entitled to relief on any grounds of her motion.

The court denies Acty's motion to vacate, set aside, or correct her conviction.

IT IS SO ORDERED.

Dated this 9th day of March, 1995.

/s/ Charles R. Wolle
CHARLES R. WOLLE, JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-1779SIDM

United States of America, *
Appellee, * Order Denying
* Petition for Rehearing
vs. * and Suggestion for
* Rehearing En Banc
Lana Christine Acty, etc., *
Appellant. *

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 20, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

ACTY - DIRECT

[p. 15] Q. And that's Mr. Bennett who was the magistrate and who is now a federal judge, is that correct, in the Northern District of Iowa?

A. Yes.

Q. Did he give you a referral?

A. Yes. He referred Larry Scalise.

Q. And did you contact Larry Scalise after your business was raided and after you contacted Mark Bennett?

A. Yes, I did.

Q. And had you heard of Larry Scalise prior to that date?

A. No, I had not.

Q. You had never heard his name mentioned or anything like that?

A. I may have read his name in the paper or something. I don't recall.

Q. Just from the newspaper, but you never personally met him, is that correct?

A. No, I had not.

Q. And how did you happen to visit with him the first time? Was it by phone, or did you go by his office for an appointment

A. The first time George Moore called him, and we met the next day.

Q. Where did you meet?

A. We met at his office on Grand Avenue.

[p. 16] Q. And that's 2910 Grand Avenue?

A. Correct.

Q. Who was present at that meeting?

A. George Moore, myself and Larry Scalise.

Q. Did you retain Larry Scalise at that time to represent you pursuant to any type of search warrant that was issued on your business and property that was seized?

A. Yes. I didn't pay him that day, but –

Q. But you did retain him. You did not pay him, is that correct; is that what you said?

A. Correct.

Q. All right. When was the second meeting that you had with Larry Scalise?

A. The second meeting was in Las Vegas.

Q. What date, as best you can recall? And I know we're going to get confused on some dates as we go along here, but as best as you can recall, what date was that in relation to the meeting that you had in Des Moines?

A. It was the first week in April 1990.

Q. Who was present at the meeting in Las Vegas?

A. George Moore, myself, Larry Scalise. Robert Vaughn was at the location. I don't know if he was at the meeting.

Q. Was this your second meeting with Larry Scalise or more than your second meeting?

A. This was my second meeting.

* * *

[p. 18] A. He had said something the first day, 3-29.

Q. He had mentioned something about a conflict, is that right?

A. No. He had said that we may be personally indicted, and at that time George told him he had nothing to do with my store.

Q. Okay, Chris. Remember, listen to the question. We'll get into that, but follow my line of questions, okay.

Did he tell you anything about a conflict of interest at that point?

A. No, he did not.

Q. After the meeting in Las Vegas and after the meeting in Des Moines, did you have another meeting with him at his office or in Las Vegas?

A. Had another meeting at his office.

Q. How did the meeting in Las Vegas come about where you ended up meeting with he and Mr. Vaughn being present in the same city?

A. There was a convention that had already been scheduled for that week with American Pipe and Tobacco Association, and we had already had our tickets and had plans to fly out for this. We told Larry this on 3-29, and he said that he was going to California and that he would fly out and he wanted money.

Q. So you met your commitment with regard to the money, is [p. 19] that right?

A. Right.

Q. Did you after the date in Las Vegas have a series of meetings with him prior to the date of July 10 of 1990? The reason I refer to July 10, that was the date John Sandre entered his appearance in this case. Do you recall a series of meetings with Larry Scalise after that date?

A. Yes.

Q. Chris, do you have any idea how many meetings you had with him prior to the time John Sandre entered an appearance in this case?

A. Prior to John Sandre you mean and after Las Vegas?

Q. That's correct.

A. I would say we had at least three meetings.

Q. All right. During any of those meetings, to your best recollection, did Larry Scalise bring up any conversation that dealt with a conflict of interest between you, George Moore and your corporation?

A. No, he did not.

Q. Did he at any point in time indicate that he had to withdraw from representing you, George Moore or your corporation?

A. No, he did not.

Q. Now, I want to go back a little bit. Now follow me with this. Before John Sandre entered his appearance, there was

* * *

[p 21] to trial?

A. Yes, we did.

Q. Tell the court, as best you can recall, what were your disagreements about prior to the time John Sandre entered his appearance and whether or not both Larry Scalise and John Sandre were there at the time that you expressed those disagreements.

A. Okay. March 29th, the day after the raid, when Larry told us that we could personally be indicted, George told him then that he had nothing to do with the store. He asked him about making a plea bargain. I told Scalise that I felt I had not broken the law.

Q. Did he at that time indicate that there was a conflict of interest?

A. No, he did not.

Q. Did you at that time bring up any information or did Larry or John Sandre bring up any information about evidence that had been seized in the raid that specifically related to a cocaine kit or literature related to a cocaine kit being distributed? Did that come up prior to the indictment or John Sandre entering his appearance?

A. I couldn't say when that came up. I don't know.

Q. Okay. Did it come up at any point in time? And we'll get later when it might have come up, but did it come up at any point in time, though?

[p. 22] A. Yes, it did.

Q. Specifically would you tell us what that literature was with regard to the cocaine kit, where that literature come from, who put that literature out?

A. I had nothing to do with those sheets. They were from George's wholesale from the early eighties. They were stored in the back of the store in a box of trash.

Q. Did you at any point prior to the indictment, to your best recollection, let Larry Scalise know that?

A. Yes, I did. And George told him that he had run the wholesale in the early eighties and those sheets had nothing to do with this presently and that they were from the early eighties, and most of the merchandise was long gone.

Q. In the meetings did George admit that it was he who, in fact, had prepared that literature?

A. Yes. He told Scalise that he ran the wholesale and they were sheets from the wholesale.

Q. And did you deny that you had anything to do with those?

A. Well, I told him that I ran the retail. George always said that he ran the wholesale.

Q. No. My question was, did you deny, though, that you had printed that literature or distributed that literature at all?

A. He presented to me like I had, but he looked to George when he was talking.

Q. I understand, but my question to you is, did you deny

* * *

[p. 24] George's name on it as buyer from Sunshine States Laboratory.

Q. Did you at that time when he made the statement about a letter being presented from the government – Prior to today's date, have you ever had an opportunity to see a letter of that nature in hand, or was it ever forwarded to you at your home throughout these proceedings since 1990?

A. No.

Q. All right. Let me ask you this: Are you using solely your recollection on this?

A. Yes.

Q. Do you recall a deposition that I forwarded to you overnight mail with regard to Larry Scalise and whether or not he had any records or any recollection of such a discussion taking place?

A. I read the deposition.

Q. All right. So you do recall a discussion like that, and you disagree with him where he indicates that he had no recollection, along with John Sandre, about any plea discussion with the government prior to the indictment, is that correct?

A. That's correct.

Q. After this discussion preindictment about a plea discussion, do you recall any other plea discussion prior to John Sandre entering his appearance, Ms. Acty?

A. No, I do not.

* * *

[p. 29] Q. Who did you first get your information from with regard to the conflict of interest so severe that you needed a new lawyer?

A. I got that information from my ex-husband.

Q. And where did you get it? And that was George Moore, is that right? And where did he discuss this with you?

A. He discussed this with me at home.

Q. And how was your relationship with him through the pretrial motions, the preindictment matter? How many times did you all live separate and apart during that time?

A. At least seven or eight times.

Q. And where would he stay during the time when all of this preindictment, the pretrial motions, the indictment action, where did he stay during that time?

A. He would fly out to California.

Q. Were Larry Scalise or John Sandre aware of the marital discord that had started with regard to you and George Moore through this matter?

A. Yes, they were.

Q. Now, let me ask you, when George brought this up, did you seek out a new attorney?

A. Yes, I did.

Q. And approximately what month was that? If you can't recall the month, approximately how long before trial?

A. Approximately one month before trial.

[p. 30] Q. And who did you contact initially?

A. I went to Bill Kutmus.

Q. Did you have a conference with him?

A. Yes, I did.

Q. Did Bill Kutmus agree to take your case at that point?

A. Yes, he did.

Q. Did you retain Bill Kutmus?

A. No, I did not.

Q. After you talked to Bill Kutmus, did you talk to another attorney?

A. Yes, I did.

Q. Who did you talk with?

A. I talked to Mr. Vaughn.

Q. And did Mr. Vaughn agree to represent you?

A. Not right away, but he did.

Q. And did he come up for a meeting?

A. Yes, he did.

Q. When you retained Mr. Vaughn, did you pay him money separate from what you had paid Larry Scalise?

A. Yes, I had.

Q. And how much did you pay him?

A. He wanted 25,000. I don't know what I paid him first.

Q. And when he came up, did he have a meeting with Larry Scalise, John Sandre or anyone else in Larry Scalise's office?

A. Yes. He flew up, and he had a meeting with Larry Scalise [p. 31] and John Sandre, and they discussed the matter, and they said that they could all work it out.

Q. To your knowledge, did you ever have Larry Scalise withdraw as your counsel in this case?

A. No, I did not.

Q. Who did you think when the date – and I believe it's the 19th of November of 1990 when Robert Vaughn entered his appearance. Did you authorize or did you tell Larry Scalise to withdraw from representing you?

A. No, I did not.

Q. Did you tell John Sandre to withdraw from representing you?

A. No, I did not.

Q. What was your impression at the time Robert Vaughn came up and entered his appearance with the court as to what he was going to be doing with regard to this case?

A. Robert Vaughn was supposed to do the drug paraphernalia charges.

Q. And that was across the board on both you and George and any liability or culpability on behalf of the corporation, is that correct?

A. Correct.

Q. Did either of those lawyers ever tell you anything differently other than what you presumed was going to be how this case was going to be handled?

[p. 32] A. No, they did not.

Q. Did you know which part of the case Larry Scalise was going to take?

A. Yes, I did.

Q. Which part was he going to take?

A. Larry Scalise was going to do the aiding and abetting charge.

Q. What about John Sandre, which part was he going to take?

A. He was going to do the money laundering charges.

Q. And you began your payment to Robert Vaughn as the case proceeded to trial, is that correct?

A. Correct.

Q. Now, as this case proceeded to trial, did you at some point discuss whether or not you were going to testify?

A. Yes, I did.

Q. What issues were you going to testify about that you thought were pertinent to your defense in this case?

A. I was going to testify about the products, where you could buy them, that they were still available. I was going to testify about the fliers that were left from the early seventies, eighties that was George's wholesale.

Q. And why did you not testify on that point – on those issues?

A. Mr. Vaughn told me not to testify.

Q. Did he tell you why?

[p. 33] A. I'm sorry, I didn't hear you.

Q. I'm sorry. Did he tell you why that you should not testify?

A. Yes, he did.

Q. What did he tell you?

A. They had discovered a water pipe in our home, and he was afraid that the subject of the water pipe, that that would show knowledge. That's what he said.

Q. Whose water pipe was it?

A. I had brought that water pipe home for George. He had told me to bring it home so he could quit smoking, and he was going to smoke apple tobacco out of it.

Q. And, to your knowledge, did he at any point do that?

A. Yes. I saw him doing that.

Q. But even in spite of that, you still wanted to testify, is that correct?

A. Yes, I did. It did not bother me.

Q. And I take it the record reflects you did not testify. Did you ever protest that or bring that to the attention of the court or anyone else, other than myself, that you wanted to testify and were not allowed to testify by advice of counsel?

A. I didn't bring it up to anyone –

Q. Would you repeat that answer, Ms. Acty?

A. I wasn't aware that I could bring this up to the court.

* * *

[p. 36] A. He had not given advice more so than Robert Vaughn, no.

Q. So his advice of counsel would have been staler, so to speak, would have been older than Robert Vaughn's, is that correct?

A. It would have been older, yes.

Q. So, in your opinion, Robert Vaughn would have been more viable as an expert witness on advice-of-counsel defense than Judd Golden, would you agree?

A. Yes.

Q. And you knew at the time that you were giving up Robert Vaughn as an expert opinion witness and then taking up Judd Golden in his place?

A. Yes. I trusted the three attorneys' advice that it would work out, and I trusted them all.

Q. Did you know any other lawyer three weeks or a month before trial who you could go to who was knowledgeable about your defenses, knowledgeable about the complexity of this case, other than Robert Vaughn, to assist you with this defense?

A. No, I did not.

Q. So, in your opinion, would it be accurate that you had nowhere else to turn other than Robert Vaughn at that point when you were told that you had to get another lawyer?

A. That is correct.

Q. Up until this day, Ms. Acty, were you, in fact, told by

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

--X

UNITED STATES OF AMERICA,

Plaintiff,   Cr. No. 90-33

vs.

POSTERS 'N THINGS LTD., an
Iowa Corporation, d/b/a WORLD
WIDE IMPORTS, d/b/a
FORBIDDEN FRUIT, d/b/a ACTY-
MOORE GALLERY; GEORGE
MICHAEL MOORE, a/k/a MIKE
MOORE, d/b/a G. MICHAEL
MOORE ENTERPRISES, and
LANA CHRISTINE ACTY, a/k/a
ACTY MOORE,
Defendants.

--X

DEPOSITION OF LAWRENCE SCALISE,

taken by Defendant Acty before Kelli M. Mulcahy, Certified Shorthand Reporter of the State of Iowa, at 10th Floor, Equitable Building, Des Moines, Iowa, commencing at 9:55 a.m., Wednesday, September 14, 1994.

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KELLI M. MULCAHY – CERTIFIED SHORTHAND
REPORTER

* * *

[p. 8] together, gave it to her, represented to me that was all that we had that belonged to her, nothing else.

Q. What about the billing records?

A. I don't have any of that.

Q. Where is that?

A. I wouldn't have the faintest idea.

Q. Do you know where it might possibly be that would show and keep your time records in this case?

A. Well, let me tell you, we don't keep time records. I never kept time records. We did a fee-for-service kind of a thing.

Q. What about John Sandre, do you know whether or not he kept time records in the case?

A. My guess is he did not. That was not our practice at the time. WE didn't work by the hour.

Q. What did you charger her as a retainer in this case?

A. Well, I suppose if you tell me I got 5,000, that's what we got. It may have been more, and we may have charged her and him – We may have been paid a total of something like 50 to 70 thousand dollars overall for representing her up to the time that we finished representing her and

* * *

[p. 11] the State of Virginia, at that point, it was obvious he wasn't going to be a witness, couldn't be a witness, but that disability disappeared. I think that case got dismissed, and so she spent a lot of time visiting with him and got a lot of advice and a lot of counsel from him.

Q. Let me ask you this: Did you have a written retainer or agreement with George and Christine at any point?

A. Not that I know of.

Q. Do you as a matter –

A. That would not be a normal practice with us.

Q. What about a letter of retainer; did you send one out outlining to her the potential conflict problem when she first retained you in March, and also outlining to her if a problem developed how that was going to –

A. Not in writing, Al. We would not have done that as a normal matter of course.

Q. Is there any reason you would not do that in writing?

A. We would just never do it. I've just said to people, "Look, if we're going to have a conflict, we'll tell you when it arises. You make [p. 12] your decision at that point. You tell us what it is you want to do."

Q. What about with regard to any correspondence, do you recall what correspondence you went to her about the progress of her case?

A. No.

Q. John Sandre indicated at some point there was a compilation of work that was done that might have been turned over to the billing department to determine how money was to be taken out of a trust account. Do you know where those records might be?

A. No.

Q. How was that done?

A. I wouldn't have the faintest idea. Bookkeeper would have done it. I wouldn't have done it.

Q. As a policy matter within the office, how was that supposed to be done?

A. Well, if money came in and was deposited into trust – There was obviously a trust account. It was kept by a lady named Connie Snyder. Connie Snyder subsequently came here when we came here. She left here at the end of maybe eight months, and I understand that she has been hospitalized with a [p. 13] mental disability. I wouldn't know where those records are, what she's done with them, and I have not talked to her about it. I have not talked to her about anything. That's three years now.

Q. Okay. Where do you normally maintain your records, then, with regard to cases that you're working on, such cases of this magnitude or a complex case like this? Where would you keep your billing records, your trust account records?

A. Well, Connie would have had them in the office.

Q. Do you know where they are at the present time?

A. I don't.

Q. I can look for them for you. I mean, I can call Connie and ask her what the hell was –

Q. We served you a subpoena duces tecum. Do you remember getting that?

A. Yeah.

Q. And you indicated by telephone to me that you had no records.

A. I have no records.

Q. What about the checking account? With regard to the records, do you have those?

A. No.

* * *

[p. 17] They were going to proceed if the Government started with an indictment in this case?

A. I truly don't.

Q. Do you have any records of any meetings with them?

A. No, sir. No.

Q. Do you have any appointment books that would reflect when you met with them?

A. We moved down here, buddy, everything went out the window, appointment books, that kind of stuff. Any book that I ever kept, any calendar I ever kept, I did not bring it here.

Q. Do you know where they are?

A. Oh, they'd have been destroyed.

Q. What about a docket control, did you keep that?

A. For statute of limitations cases.

Q. Okay. What about your criminal clients that would reflect when hearings would be coming up, when you would have meetings with clients?

A. That would be on the calendar.

Q. You didn't keep a separate docket control?

A. That would have been on the calendar.

Q. Did you keep a correspondence file that

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[p. 22] her prior to the time that Robert Vaughn became involved in the case?

A. The only think I can tell you is that it's in my mind that there were times when they had arguments. I don't recollect anybody ever filing to dissolve their marriage. I don't recollect ever having a discussion with anybody about dissolving the marriage.

Q. Do you recall them having a disagreement about whose responsibility it was to operate the business prior to the time that an indictment was returned?

A. I can tell you that after we were involved with them, George came to us and said to us, "I had nothing to do with that business." That put him, then, in a conflict of interest situation, and we had a meeting with her in our office and told her that we were now in a conflict of interest. We were going to represent her – I mean – excuse me – we were going to represent George. She needed to have her own counsel.

She had been talking to Vaughn. I told her I thought as well that she needed Vaughn as a witness. The best defense that she had was advice of counsel. Vaughn fit that bill. He was the guy

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[p. 26] A. I think that would be a fair statement. There were times when George wasn't available.

Q. Did that impede the preparation of the defense in this case?

A. Well, it didn't stop us from going over to the Internal Revenue's office, Internal Revenue Service's office, and going through records, so – and pulling those things out and spending days looking at that stuff. It did not impede us in that sense.

Q. But you you [sic] wanted him to go through the records; is that correct?

A. Well, Lana went through some of them, and he went through some of them, but in the sense of getting prepared to try this case, no, it didn't impede us. I mean, the long and short of it is there was really one defense to it. It was called the advice of counsel. It was the best defense.

Q. When she withdrew from that defense, as you indicate, did you outline to her in writing the effect of that withdrawal?

A. No.

Q. Is there any reason why you did not –

A. I told her directly.

Q. Is there any reason why you did not

* * *

[p. 28] Q. do you have any recollection of directing that a memorandum be prepared on that issue?

A. Al, there's something floating around in my mind about that, but I can't answer it directly for you. You may want to ask John about that.

Q. Okay. Did you ever bring to the attention of the Court the nature of the conflict that existed and how you could go about resolving the conflict at all?

A. I don't think so.

Q. When you first filed an appearance where your office was representing both George and Lana on these indictments, did you indicate to the Court at all there might be a possible conflict of interest in this representation?

A. I don't think so.

Q. Do you have any idea how much work was done between May – I'm sorry – March 28th, when the business was initially raided, and July 10th, when you filed an appearance – when your firm filed an appearance in this case for either of these parties?

A. No. A ton, but the answer is no, I can't tell you. I can't give you hours, minutes, any of that.

* * *

[p. 39] wouldn't have taken any type of plea in this case?

A. No. As I tell you, I don't recall ever talking to anybody about pleas in this case.

Q. Did anyone ever talk with you about a plea in this case?

A. Not that I know of. Not that I remember.

Q. And that would have been throughout the entire time of the representation?

A. That's my recollection. I don't recall ever talking to anybody about a plea agreement. No one ever came to me with a written plea agreement that I ever remember.

Q. Did you ever tell Chris Acty that John Sandre was representing her to the exclusion of George?

A. Gee, I don't think so.

Q. Okay. So you would agree throughout the matter, until Robert Vaughn came into the case, that your firm both represented Chris Acty, Posters 'N Things, and George Moore; is that correct?

A. Yes, sir. That's until we had that discussion that I've outlined here for you.

MR. PARRISH: I have no further questions. Thanks, Larry.

MR. VANDER SCHEL: Larry, before we get

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[p. 49] Q. Do you recall what you would have explained to them or what your usual procedure is to explain –

A. Usually what you say to them, "If we get into a thing where one of you is going to be a witness against the other, we're going to – you're just going to have to resolve that. That will be a conflict." It's that kind of thing.

I was curious as to who was getting indicted, which one, if not both, and it was apparent both of them had a problem, at least they thought they had a problem. That's what was going on.

I told them if we got to the point where there was a conflict, we'd have to sit down and discuss it, make a different arrangement with respect to who represented who. But at that point in time, there wasn't a conflict that I saw. And I wasn't make aware of any conflict. After all, they were married to each other.

Q. Do you recall why the meeting took place in Las Vegas?

A. I got a phone call and said, "Here's where we are. Please come out and see us." I can't tell you who called me.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

POSTERS 'N THINGS LTD., an Iowa Corporation, d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT, d/b/a ACTY-MOORE GALLERY; GEORGE MICHAEL MOORE, a/k/a MIKE MOORE, d/b/a G. MICHAEL MOORE ENTERPRISES, and LANA CHRISTINE ACTY, a/k/a ACTY MOORE,
Defendants.

Cr. No. 90-33

DEPOSITION OF JOHN SANDRE,

taken by Defendant Acty before Kelli M. Mulcahy, Certified Shorthand Reporter of the State of Iowa, at 7405 University Avenue, Suite 10, Des Moines, Iowa, commencing at 8:05 a.m., Wednesday, September 14, 1994.

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KELLI M. MULCAHY – CERTIFIED SHORTHAND REPORTER

* * *

[p. 4] Iowa; is that correct?

A. Yes.

Q. And you are also licensed to practice around the State of Iowa, so to speak; is that correct?

A. Yes.

Q. And you're also licensed to practice in the Southern District of Iowa?

A. Yes.

Q. And beginning in 1990, and the date yet to be determined, you were hired at some point to – your firm, at least, was hired to represent Chris Acty, Posters 'N Things, in addition to also representing a George Moore?

A. Yes.

Q. Okay. Now, to be correct on the dates, do you recall the date offhand, John, when that took place?

A. I really don't, Al, I'm sorry.

Q. Okay. Would it have been sometime about March of 1990? Would that be accurate at all?

A. It's difficult for me to remember when Larry first got into the case. I recall him getting into the case, and that was a period of time before I got in with him, but that's probably

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[p. 6] then a payment was made to me, or anything like that. I was a payment into the firm.

Q. How did you initially get called in to begin working on this case? Could you tell us mechanically how that was, in fact, done?

A. Larry and I were right across the hall from each other, and he just called me in and asked me if I would work the case with him.

Q. Had he already started doing some work on the case at that point?

A. I'm certain he had. I don't know to what extent. I know that he had met with them, I believe, in Las Vegas at the time.

Q. Okay.

A. I know that he had met with Chris and Mike at the office on several occasions, I thought – I remember, because I remember them being at the office for long periods of time prior to the time I ever got involved, so I knew about the case, I knew who the people were before I even got involved.

Q. Whose client were they considered in the office? Were they considered your clients, Larry's clients, or some else in the office's client?

A. Larry's.

Q. In that type of situation, do you ever get

* * *

[p. 8] the U.S. Attorney's Office about a plea between George and the Government?

A. I don't know.

Q. It never came to your attention?

A. Not that I recall. But that doesn't mean that it didn't happen. It just means I don't recall.

Q. Do you ever recall, prior to – I'm going to give you a copy of – This is already in the record by agreement, so this is a copy of an appearance that you've signed, I believe, back 7-10 of 1990; is that correct?

A. Yes, sir.

Q. And for the record, I'm referring to a copy of an appearance of July 10th, 1990. I believe it was signed on 7-10, 1990, by John Sandre entering his appearance for Lana Christina Acty. And also on that date, 7-10, 1990, do you agree this is a copy of an appearance that was entered on behalf of yourself for George Michael Moore?

A. Yes.

Q. To you knowledge, did Larry Scalise ever enter an appearance, or were you entering an appearance for the firm at that time?

A. I don't know.

* * *

[p. 14] conflict of interest if Mike or Chris would take different positions in terms of how the store was operating, why it was operating that way, what advice they'd been given, all kinds of collateral sort of facts that might go to one or the other's intent. I saw it as a potential conflict of interest if they had differing positions in terms of who was in control, who called the shots, who made the decisions, things like that.

Q. And when you made that disclosure to them with regard to a potential conflict of interest, do you recall at all their response?

A. I don't recall there being any question in anybody's mind, at least in the early stages, that their position was 100 percent unified. It was only maybe – to go down the road a little bit, it was only as we got into the fall and the winter and prior to trial that Mr. Moore began to talk in terms of him not having nearly as much involvement as Chris and not having any real control over what went on at the store and was hardly ever there, and things of that sort, where it began to appear to us that there might be a conflict in their positions.

Q. You –

A. And I – [p. 15] would be the normal way I would do it.

Q. When that was done, who did you indicate you were working for? If you carried both those clients on your trust, would you indicate you were working for Lana or Christine Acty, or George Moore?

A. It depended on who our client was at the time. If it was George Moore, it would be, obviously, for George Moore.

Q. I'm going to show you a record of an appearance that was filed by John Sandre on the 10th of July of 1990, and both – and for another appearance filed on the 10th of July, 1990, where he entered an appearance for both George and Christine Acty.

A. Okay.

Q. Do you know whether or not, prior to that time, you drew money from this account?

A. I can't begin to tell you.

Q. Is there any way you can check your records to find out what you have available?

A. I don't have any records. If I visit with Connie and she tells me that she's got the records, I'll get together whatever I can get together for you, and I'll get them to you.

* * *

[p. 22] represent me because of this potential conflict of interest." I don't think – Clearly, that had nothing to do with it.

She wanted Robert Vaughn to represent her. Whether it was because she didn't think we knew enough about the drug paraphernalia statute, or that compared to him we didn't know enough, that's kind of my sense of what I remember her talking about.

Because in addition to what Larry told me that he said to them in Vegas about Mr. Vaughn, I can recall a meeting in his office, which I think is now your office, where that whole thing was discussed again with Mike present, with Chris present, with me present, and Larry telling them that he thought Mr. Vaughn was much more appropriately an advice-of-counsel witness than attorney to try the case.

Q. And did –

A. And I couldn't have agreed more with that.

Q. And did you advise her after of that, or did Larry advise her of that, to your knowledge?

A. I was there. He said it.

Q. And she went against that advice?

* * *

[p. 24] accurate in this sense: As we go to trial, we're representing Mike Moore, he's representing the corporation and Chris, and there's no question that among the three of us, we divided the work so that we – in an effort to perform better. For example, I think Larry was concentrating on the drug part and the aiding and abetting, and I was concentrating on the money laundering part of it, and Mr. Vaughn was concentrating on the drug paraphernalia statute.

I mean, that's the way it was decided to be done, and that's the way it worked out. That is not the same thing as saying that, "I'm only in the case to do this." I mean, I'm certain he cross-examined on all the issues, not just – not just the drug paraphernalia statute. But that was his area of emphasis, no question about it.

Q. Mr. Vaughn also indicates that he was never consulted on any pretrial motions that were filed so there could be a predetermination as to whether or not the Court was going to use the objective test or the subjective test. Do you know whether that's accurate or not?

A. I don't know if that's accurate or not.

Q. He indicated that his –

A. And I guess –

* * *

[p. 27] want to flip through it.

A. Yes.

Q. Okay. Do you remember why they withdrew it?

A. I really don't as I sit here. I don't remember.

Q. But the record would pretty much speak for itself. You can't think of any other reason other than the reasons on the record?

A. No. Whatever those were. I don't recall.

Q. Who called the main shots for this case as it proceeded? Was it you, or was it Larry Scalise?

A. I would say – I would say Larry, but not in an overwhelming kind of fashion. I mean, Vaughn had a terrific amount of input in this, and I think I did too.

Q. Prior to the date of his appearance, you would say he had a tremendous amount of input?

A. It's really hard for me to separate time frames on the basis of appearance dates. I don't have any question in my mind that I discussed matters with him prior to that appearance date. I'm also certain that he became more involved after

* * *

[p. 29] some marital discord during the course of the trial preparation.

A. Yeah, I think so. I mean, I don't know that they physically separated or didn't, but I would be made aware of arguments, yeah.

Q. Okay. Did these arguments, in your opinion, interfere with your trial preparation?

A. No.

Q. Did you ever discuss those marital problems they were having?

A. No. No. No.

Q. Do you know whether any of them were business-related or related to the trial preparation?

A. I can't recall. You know, it could have been, because one thing that sticks in my mind was that it was very difficult to get Mike into the office to get him looking through documents to – You know, as we all do, you take things that are personal to people who know a whole lot more about it as the client than you do as the lawyer and say, "Run through these things for me and help me understand them and work through them," and it was just real hard to get him doing that stuff. That could have been some of the discord. I don't

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[p. 7] known as the National School of Law.

Q. And you finished in what year and admitted to the bar in what year?

A. Graduated in 1978 and I believe admitted to the bar in 1979, the following year.

Q. And would you tell me just briefly, do you have a specialty that you practice in?

A. My specialty as such is particularly the issue of drug paraphernalia, whether it be on a state or federal level. I might mention that I have represented or tried cases involving the issue of drug paraphernalia in 28 different states.

Q. How many appeals have you handled in that area?

A. On the appellate level, the case of U.S. versus 57,000-some Items of Drug Paraphernalia, I handled it in the Sixth Circuit and wrote the writ of certiorari to the Supreme Court, which was denied. I wrote the writ of certiorari to the Supreme Court, Eleventh Circuit,, in U.S. versus Florida Businessmen for Free Enterprise out of Miami, Florida. That was denied as well. And, of course, I worked with Chris's case at the Eighth Circuit, U.S. versus Posters 'N Things and presently have a pending appeal at the United States Court of Appeals, Fourth Circuit in Richmond.

Q. Have you specialized in any other area of the practice of law other than drug paraphernalia law or criminal law?

A. Not as a specialty, quote/unquote.

* * *

[p. 11] drug paraphernalia, where it had gone and status of the law at that point in time and things of that particular nature. I did not or could not determine – or if I did, I have forgotten – whether or not he actually represented one or both or either of them.

Q. Did either of them retain you at that point, at that meeting?

A. At that time I was sensitive to the fact that I was a legal counsel, if you will, as well as an executive director, which in my mind now, as I reflect, that was probably a conflict in and of itself with that organization that I represented. But rather than have the possibility of there being a question on an attorney-client basis, there was a retainer signed which, quite candidly, I've been reviewing my files, and I couldn't find it this morning in time. It was signed I believe by Mr. Moore – I cannot recall if Ms. Acty signed that as well – with a token $1, whatever, as a retainer paid to establish an attorney-client relationship.

Q. And that relationship was supposed to be established between who? Could you be a bit more specific?

A. I apologize because I cannot recall as to whether or not it was strictly with George Moore or whether it was with George Moore and Chris Acty together. Again, it was done strictly for the basis of establishing an attorney-client relationship so there might be that confidential type of [p. 12] discussion.

Q. It's your position at this time that you believe that the signing of that document, if both of them signed, would have been a conflict of interest because of the situation you had as advisor to them in their business?

A. There may well have been a conflict had both of them signed it at that particular point in time simply because of the fact I could not represent both parties. I felt at that point in time that my relationship with the two of them was on a consulting basis as to the status of the issue of drug paraphernalia without an actual application of my background into their case per se.

Q. Let me go from that meeting in Las Vegas to what I would call any preindictment discussions about plea negotiations.

A. Let me hesitate just a moment, Mr. Parrish. I don't want to be windy.

Q. Sure.

A. The reason that an agreement was signed, at that particular time my files were under attack, if you will, and under an extensive Vaughn index out of the Eastern District of Virginia in a case, U.S. versus Dyer. At that particular time I was a target of a federal investigation. Later, I believe about two months later, I was actually indicted in that case. I was very sensitive to my files being available and attempts to have subpoenas for the files and things of that nature, and

* * *

[p. 15] in Alexandria, Virginia, and may have been removed from the files anyway.

Q. Were you forwarded any copies of any plea agreements or plea discussions between the government, George Moore or Chris Acty preindictment? That's all I'm talking about right now.

A. Not to my better recollection, no, not that I recall.

Q. All right. After the indictment was returned May of 1990, up to and including the time you came into the case – Well, let's stop at the end of the pretrial motions. Let's stop at the end of pretrial motions. Were you consulted from the time the indictments were returned in mid May up to and including the end of the hearings on the pretrial motions? And I don't mean the pretrial motions that included disqualification of you as counsel but the major pretrial motions in the case. Did you ever come in and give advice or advise Chris Acty on anything having to do with her defenses in this case?

A. Not as I recall, Mr. Parrish. At that particular time there were no doubt conversations between Mr. Scalise and I. Frankly, pretrial motions in defense of Chris and George were filed, and I didn't actively participate in those at all. And that bothered me because the subjective versus objective issue which has been prominent in this case, in my opinion, never was fleshed out, and that's something I thought should be addressed; but, nonetheless, I didn't actively participate in [p. 16] the pretrial motions, but there may have been conversations between Mr. Scalise and I as to what he was to do.

Q. Had Chris Acty ever placed you on retainer having to do with this file by paying you fees for services from the time of the indictment up to and including in the pretrial motions, to the best of your recollection?

A. No. In fact, I was not brought into the case until, as I recall, about November the 14th or November 15th.

Q. Right. We're going to get into that.

A. November the 14th I was in Des Moines, Iowa. I did reflect back through the files this morning trying to be as accurate as possible.

Q. We're going to get the date in November when you came in, but prior to that we're talking up to pretrial motions right now.

A. I don't think so.

Q. Okay.

A. Candidly again, on September the 17th the indictment against me was dismissed, and I would have accepted no case. Following September I did accept cases but not prior to that time. That would have been September 17th, I believe, of 1990.

Q. And would that also be true of George Moore, that you never came in and represented him during any of that time after the indictment up to and including the end of the

* * *

[p. 18] Des Moines, Iowa, and I did have an opportunity to with Mr. John Sandre go to the property area, which was a warehouse, to go through all of the seized items at that time.

Q. Why were you called into the case at that point, Mr. Vaughn? Who were you to represent, and what was your role to be in this case?

A. At that particular time when I was called in, as I recall, there was no strict delineation as to whom was representing whom in the case. While there I do recall a conversation between Mr. Scalise, Mr. Sandre and I when we said, well, you know, who is going to represent who, and at that point it was decided after I had arrived there that Mr. Sandre would represent the corporation, Mr. Scalise would represent Mr. Moore, and I would represent Ms. Acty.

Q. At that time did you discuss any conflicts with Ms. Acty when that meeting took place and those decisions were being made?

A. Not to my knowledge. I may well have discussed the fact that each entity should be represented separately because obviously there is a conflict there between the three, and I may have mentioned that, but I may have mentioned that earlier by phone in conversation with her prior to arrival there.

Q. When you filed your appearance in this case, which evidently was on the 17th did you file it pro hac vice, or

* * *

[p. 26] indicated she was going against his advise and you should remain in as an expert on an advice-of-counsel defense?

A. I do not recall that, no.

Q. Now, once you became involved in the case on the 15th up to and until the time of trial, to your knowledge, had there been any previous plea negotiations either between Chris Acty, George Moore or Posters 'N Things that you were involved in, plea negotiations only?

A. Not at all, and the reason that I recall that so clearly is upon my arrival I insisted that Mr. Sandre and I meet with Mr. Paff in his office because I was wondering if every opportunity had been taken to try to resolve the case pretrial. And Mr. Sandre and Mr. Paff and I – and Mr. VanderSchel may have been available at that time as well, and we had a meeting in Mr. Paff's office, and at that time he had indicated what the plea agreement would be as far as being available to Ms. Acty at that time.

Q. You would agree that prior to this date you had never had any plea discussions with either of the parties in this case as their representative; would that be true?

A. That is true, and I say that based upon my memory, as I recall. I felt that it was needed to go in and talk to the prosecutor. I spoke to John Sandre, and I said, you know, gee, could this thing be resolved, or has everything been done possible to try to resolve it, and, you know, let's go and

* * *

[p. 30] between Chris and I as to whether or not she would testify at trial. That became a more pointed issue, and it was based upon my counsel to her that she not testify after the government had produced an exhibit that came directly from her home that potentially had residue on it, and at that point in time, between Mr. Scalise and I, we were successful in having this particular piece of evidence suppressed. And I knew that if she took the stand following that, that particular piece of evidence would be brought forward.

Q. I take it she wanted to testify; is that accurate?

A. She did want to testify, that is correct.

Q. Did she also want to testify specifically about certain documents that were found by the government in their search relating to the distribution of literature that indicated cocaine kits were available through a business that George ran?

A. Yes. We spoke in terms of that, and I attempted to have that evidence suppressed because it was stale. It was my accusation that the evidence was very, very old, years old and served no real purpose of evidentiary value. The court did allow that to some in, I believe, on showing issues of motive, but to be specific I don't recall.

Q. Okay. The last question I have for you is, were you aware of the marital discord that was going on between Chris Acty and George Moore through the time you began representing [p. 31] them?

A. Yes. It had been sort of an off again, on again scenario. My knowledge or background of them over a period of time had been such that at one point she had been referred to as Chris Moore, and she said, "No. You know, my name is Chris Acty, and I don't want my name as Moore." I don't think that necessarily went to the issue of marital discord, but she was unique and wanted to remain unique from George Moore. And at that point in time, I knew that they had sort of an off again, on again type of marriage.

Q. Did you ever consider once you came into this case of filing a motion to continue in order to be better prepared for this case since you came in in November and the trial was set in December?

A. No, I did not file a motion, nor did I consider one at that point in time.

Q. Why not?

A. At that particular time I was representing Ms. Acty, and as the case had been divided, the issues of drug paraphernalia were going to be uniquely handled by myself. The issues of the 841, the manufacturing of controlled substance were to be handled by Mr. Scalise and Mr. Sandre. I was going to be centering the majority of my defense in reference to Ms. Acty on the issue of drug paraphernalia, which was, again, my specialty background.

[p. 32] Q. Who was going to do the money laundering?

A. The money laundering at that point in time – again, this is my better recollection – was going to be dealt with by Mr. Sandre who advised he had had previous experience in that area.

Q. And the final question again is, did you ever see anything in writing explaining to Chris Acty that there was a conflict prior to this time and she consented to this relationship that existed amongst the lawyers?

A. No. And that was not an issue on my mind at that particular point in time. I had not been brought in on pretrial motions. I was brought in uniquely on the issue of trial, and perhaps that's an issue that I should have researched or looked at, but I did not.

MR. PARRISH: I have nothing further.

Thank you, Mr. Vaughn. I think Mr. VanderSchel is going to be coming up in just a second.

THE WITNESS: Thank you.

THE COURT: All right. We'll continue with questions by Mr. VanderSchel.

CROSS-EXAMINATION

BY MR. VANDERSCHEL:

Q. Good morning, Mr. Vaughn.

A. Good morning, Mr. VanderSchel.

Could you hold for just a moment?

* * *

[p. 35] in that position that she was not willing to enter a plea of guilty to any charge that would require a prison term?

A. I think that's a fair representation, yes.

Q. As far as you being a possible witness in her defense, I want to ask you a few questions about your role as executive director of the American Pipe and Tobacco Council. In that role did you provide specific legal counsel to individual members of the American Pipe and Tobacco Council?

A. I provided at that time, in my opinion, what my interpretation of the law was. I provided to those members that subscribed to that organization background information of analysis on the law, things of that nature, as I interpreted and understood the law at that point in time.

Q. At that particular time you were distributing a newsletter, is that correct?

A. That's correct.

Q. And that's the manner in which you distributed this information to members of the American Pipe and Tobacco Council?

A. It would have been primarily via the newsletter, that's correct. There may have been other specific – for example, an individual may have said I have employees and, you know, is there any sort of document under which I could secure the employee, that is to say, let them know that if they drank while on the job or possessed firearms or possessed controlled [p. 36] substances, what not, they would be subject to termination, what not. I may have supplied that, that particular document.

Q. Well, prior to the execution of the search warrants in March of 1990, did you ever represent Lana Acty in an individual capacity?

A. No. Not to my better recollection, no.

Q. And is that the problem you were referring to earlier as far as whether or not you could be a witness in an advice-of-counsel defense?

A. That's correct, because I had not actually been retained, and my understanding of the counsel position, what not, became more pointed to me in light of the case in Alexandria, Virginia, in which I was indicted because it became quite clear that I had not actively represented any of the individuals and that, of course, on that basis gave the government access into a number of my files in the Dyer case, and that was the reason that there was a Vaughn index set up, and in some cases I had actually represented certain individuals on a state or federal level, and those files had to be segregated out.

Q. Did you also discuss with Lana Acty other problems that may result if you were a witness on her behalf specifically relating to the fact that you were indicted in the Eastern District of Virginia and whether or not that case may have any bearing on her case?

* * *

[p. 42] Q. It is true that Mr. Rappaport at one point in time was also associated with the American Pipe and Tobacco Council?

A. I would not say associated. He on numerous occasions did speak before the audience and before the group during our national meetings and what not, but he was independent of the organization in and of itself. He was simply an expert.

Q. Did he ever hold office within either the American Pipe and Tobacco Council or the American Businesses for Constitutional Rights?

A. No, not at all. Now there was a collateral organization that had been actively working in lobbying in

Washington, things of that nature, called the American Pipe and Accessory League, and Mr. Rappaport may have been an officer in that organization, but I don't specifically recall.

Q. Was he a member of the American Pipe and Tobacco Council?

A. No, no. The membership was such that individuals paid fees and dues and things of that nature, and it's my better recollection that Mr. Rappaport did not do that.

Q. As far as your representation of Lana Acty is concerned, both before trial and during trial, did you represent her to the best of your abilities?

A. I felt at that time that I was, and, of course, in retrospect now I find that my approach to the trial was probably incorrect in that I was trying the case as a subjective intent case.

[p. 43] Q. But you were aware, going into the trial, that the trial court, Judge Wolle, had already ruled in favor of an objective standard in this particular case following the lead from the Eastern District of Virginia?

A. At that time, Mr. VanderSchel, I did not have that information, and I had talked – I remember having a conversation with Mr. Paff, and Mr. Paff seemed to be quite satisfied that the court had ruled in that fashion, but I had never observed pretrial orders of the court specifically stating that the law was objective in nature. I buttress that with the fact in my memory talking with Mr. Scalise, and Mr. Scalise advised that in his opinion that issue had not been broached as well.

Q. But the record could speak for itself on that issue, is that correct?

A. I'm sure it would, yes.

Q. Were your decisions and the advice that you provided to Lana Acty based on the effects of your decisions on her individually, or were they based in any way on the effects on other defendants in the case?

A. I'm sorry. I'm not sure I understand the question.

Q. Were you providing your advice to Lana Acty to her individually, or were you trying to represent more than one party in this case?

A. No, no. My advice was to Ms. Acty, but the defense was a

* * *

DEFENDANT'S
EXHIBIT
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MARTENS & COMPANY, CPA, C

CERTIFIED PUBLIC ACCOUNTANTS
4949 Pleasant Street, Suite 104
West Des Moines, Iowa 50266
(515) 223-4841

[LOGO]

FAX: 223-0851

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MARVIN K. STEFFENSEN, CPA
JOHN L. STUBER, CPA
BRIAN D. WILLEM, CPA

September 14, 1994

Posters N Things
P.O. Box 3246
Des Moines, Iowa

Dear Chris Acty:

In reviewing the legal expenses for April, 1990 through December, 1991, I found the following checks were written to Larry Scalise on the Posters N Things bank account.

While Martens & Company are not in possession of the cancelled checks, these amounts were taken from the general ledger of Posters N Things.

Date	Check No.	Amount
04/30/90	Temp Check	$ 2,500
05/22/90	1023	2,500
06/24/90	1097	2,500
07/18/90	1161	2,500
08/07/90	1214	2,500
08/21/90	1252	2,500
11/19/90	1510	20,000
12/17/90	1560	5,000

Date	Check No.	Amount
01/19/91	1628	$2,500
02/06/91	1684	2,500
02/21/91	1717	1,500
02/25/91	1725	1,000
03/04/91	1742	3,000
03/07/91	1746	1,500
03/15/91	1769	3,000
10/15/91	2746	2,500

Sincerely,

/s/ John L. Stuber
John L. Stuber, CPA

JLS:krw

DEFENDANT'S
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MARTENS & COMPANY, CPA

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JOHN L. STUBER, CPA
BRIAN D. WILLEM, CPA

September 16, 1994

Posters N Things
P.O. Box 3246
Des Moines, Iowa

Dear Chris Acty:

After further review of legal expenses paid by Posters N Things for the period March 1990 through December 1992, I found the following entries in your General Ledger.

Robert Vaughn

Date	Check No.	Amount
05/29/90	1037	$1,125.00
09/17/90	1345	375.00
09/27/90	1382	375.00
10/29/90	1458	2,000.00
11/13/90	1499	5,000.00
11/26/90	1520	4,000.00
12/17/90	1567	2,000.00
12/22/90	1575	4,000.00
01/07/91	1599	3,000.00
01/18/91	1623	2,000.00
01/29/91	1655	1,000.00
02/04/91	1672	500.00
02/10/91	1694	500.00
02/15/91	1705	2,500.00
03/05/91	1743	1,165.57
04/06/91	1820	1,000.00
04/24/91	1847	500.00
04/26/91	1849	$1,000.00
05/09/91	1893	1,000.00
06/07/91	1963	1,000.00
06/10/91	1971	5,000.00
06/30/91	20	5,000.00
07/17/91	2522	5,000.00
08/25/91	2616	5,000.00
09/11/91	2664	5,000.00
11/11/91	2823	5,000.00
12/31/91	2905	2,000.00

12/23/91	2945	1,500.00
01/14/92	3002	750.00
01/29/92	3043	764.00
07/15/92	3454	7,000.00
07/31/92	3502	2,000.00
08/16/92	3548	2,000.00
08/31/92	3610	6,500.00

Judd Golden

Date	Check No.	Amount
12/19/90	1568	$ 210.00

Date	Check No.	Amount
12/20/90	1569	$ 210.00

Peterson Court Reporters

Date	Check No.	Amount
06/10/91	1972	$ 44.00
06/17/91	1978	$5,000.00

Date	Check No.	Amount
07/26/91	2546	$3,207.50

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Robert

is Larry paying your fee? OUR deal
is 25,000 Each. Cap. CHRIS, ME. Do we just
Transfer 1 over to you. Was your 35,000 including Expenses?
No 1 has told me yet. Who are you representing. Me
or Chris. Larry said you have to file Right away
with the Courts. Is Moffett good in Trial OR motions
OR both. Do you think we should try + get him also?
Do you have motions you want to file that Larry
didn't. My feelings are you should try to get
the Court date changed. IT Bothers me of going
to trial just before Xmas. 1 way it we might
make jurors mad, by keeping them from Xmas
Shopping, etc. & the other way they might be compassionate.

Mike

619-270-1208

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253 P01 NOV 30 '90 12:10

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-23-

Robert.

Alan of Sunshine has alot of dealings with Les Pearl. He cut him off & Les wanted to sue Sunshine. Maybe you can get more info. He told me he had invoices in boxes but didn't know where & his records he erased on the computer every year. We bought his big 'master' - Mammoth promo at the Atlanta Show, but he didn't know from date. I thought it was the Chicago show. At the Same time we bought Mega, Sumo, incense from him. The only thing I knew Les to buy from Chris was some of the incense & he made Statements he gave it away to girls to get them in Bed with him. He wore a necklace like a dick with 10 1/2 on it & he would show it to girls all the time. We need to get all the records we can from Alan & his problems with Les Pearl. We got fed up selling the incense & returned it to Alan.

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255 P01 NOV 20 '90 12:54

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Robert & Larry

Just called Stanley of Pacific Cals. He is sending info on Imastat & Mannutas. Can't find in the computer where he sued Leo Pearl. Do you know the name of his co. Stanley would like paper work on the case so he can give to his lawyer. He said we could contact his lawyer for info. He told me he had over 1300 accounts in the U.S.

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GOVERNMENT
EXHIBIT
3

U.S. Department of Justice

[LOGO]

United States Attorney
Southern District of Iowa

April 30, 1990

115 United States Courthouse *FTS: 862-6257*
Des Moines, Iowa 30309 *515/284-6257*

Lawrence F. Scalise
2910 Grand Ave.
Des Moines, IA 50312-4205

RE: George Michael Moore

Dear Mr. Scalise:

We have approached this matter in two separate ways for a pre-indictment discussion regarding George Michael Moore. Our preliminary calculations are as follows:

1. A violation of 18 U.S.C. § 1956(a)(1)(A) is found in the sentencing guidelines at 2S1.1. The base level is added in that the funds involved were over $2,000,000. I believe a § 3B1.1 adjustment under A, that is, 4 more for a leader in an extensive organization. The following sets

out then our calculation for a violation of 18 U.S.C. § 1956(a)(1)(A).

Base level offense § 2S1.1(a)(1)	–	23
$2,000,000 plus § 2S1.1(b)(2)	–	6
Organizer § 3B1.1	–	4
Base level		33
Acceptance of Responsibility	–	2
Result		31

This results in a sentence of 108-135 months.

2. A violation of 18 U.S.C. § 1957.

Base level offense § 2S1.2	–	17
Adjustment § 2S1.2(b)(1)(B)	–	2
$2,000,000 plus § 2S1.2(b)(2)	–	6
Organizer § 3B1.1	–	4
Base level		29
Acceptance of Responsibility	–	2
Result		27

This results in a sentence of 70-87 months.

Obviously these are preliminary calculations and represent the "best case" of the government which we believe we can prove. The only areas of disagreement I can see would be the upward adjustments under § 2S1.2(b)(2) and § 3B1.1. These matters might be reserved by a plea agreement for argument to the sentencing court, however, these items cannot in our view be ignored. Similar calculations might apply to a pre-indictment discussion of Lana Acty.

Your comments and suggestions are welcomed.

Sincerely,

Gene W. Shepard
United States Attorney

/s/ Lester Paff
Lester A. Paff
Assistant U. S. Attorney

LAP/mj

cc: Kevin VanderSchel

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES	)
OF AMERICA,	) Criminal No. 90-33
	)
Plaintiff,	) SUPERSEDING
v.	) INDICTMENT
POSTERS' N THINGS	) (T. 21, U.S.C., § 857(a)(1))
LTD, an Iowa	) (T. 21, U.S.C., § 841(a)(1))
Corporation, d/b/a	) (T. 21, U.S.C., § 854)
WORLD WIDE IMPORTS,	) (T. 18, U.S.C.,
d/b/a FORBIDDEN	) § 1956(a)(1)(A))
FRUIT, d/b/a ACTY-	) (T. 18, U.S.C., § 1957)
MOORE GALLERY;	) (T. 18, U.S.C., § 2)
GEORGE MICHAEL	) (T. 18, U.S.C., § 371)
MOORE, a/k/a MIKE	) (T. 21, U.S.C., § 853(a))
MOORE, d/b/a G.	) (T. 18, U.S.C., § 982(a))
MICHAEL MOORE	) (Filed May 16, 1990)
ENTERPRISES; AND	)
LANA CHRISTINA ACTY,	)
a/k/a CHRIS ACTY,	)
	)
Defendants.	

THE GRAND JURY CHARGES:

COUNT 1

That on or about August 17, 1989, in the Southern District of Iowa and elsewhere, POSTERS' N THINGS LTD, d/b/a WORLD WIDE IMPORTS, GEORGE MICHAEL MOORE, and LANA CHRISTINA ACTY, Defendants herein, did knowingly and unlawfully make use of the service of United Parcel Service, an interstate conveyance, as part of a scheme to sell drug paraphernalia, as defined in 21 U.S.C. § 857(d), which was obtained from Fine-Line Products, Inc., of Milwaukee, Wisconsin.

This is in violation of Title 21, United States Code, Section 857(a)(1).

THE GRAND JURY FURTHER CHARGES:

COUNT 2

That on or about November 8, 1989, in the Southern District of Iowa and elsewhere, POSTERS' N THINGS LTD, d/b/a WORLD WIDE IMPORTS, and LANA CHRISTINA ACTY, Defendants herein, did knowingly and unlawfully make use of the service of United Parcel Service, an interstate conveyance, as part of a scheme to sell drug paraphernalia, as defined in 21 U.S.C. § 857(d), which was obtained from Fine-Line Products, Inc., of Milwaukee, Wisconsin.

This is in violation of Title 21, United States Code, Section 857(a)(1).

THE GRAND JURY FURTHER CHARGES:

COUNT 3

That on or about the 26th day of January, 1987, up to and including the 28th day of March, 1990, in the Southern District of Iowa and elsewhere, POSTERS' N THINGS LTD, d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT, d/b/a ACTY-MOORE GALLERY, GEORGE MICHAEL MOORE, and LANA CHRISTINA ACTY, Defendants herein, did willfully and knowingly combine, conspire, confederate, and agree together, and with diverse persons known and unknown to the Grand Jury, to commit an offense against the United States; namely, to knowingly and unlawfully make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia, as defined in 21 U.S.C. § 857(d), in violation of Title 21, United States Code, Section 857(a)(1).

OVERT ACTS

In furtherance of this conspiracy and to effect and accomplish the objects of it, one or more of the conspirators committed the following overt acts:

a. On or about August 17, 1989, the Defendants did cause drug paraphernalia to be shipped and delivered by United Parcel Service, an interstate conveyance, as a result of a telephone order placed to Fine-Line Products, Inc., of Milwaukee, Wisconsin, by George Michael Moore on August 15, 1989;

b. On or about November 8, 1989, the Defendants did cause drug paraphernalia to be shipped and delivered by United Parcel Service, an interstate conveyance, as a result of a telephone order placed to Fine-Line Products, Inc., of Milwaukee, Wisconsin, by LANA CHRISTINA ACTY on November 6, 1989; and

c. On or about January 11, 1988, the Defendants did cause drug paraphernalia (including Toker II's and Mini-Toker's) to be shipped and delivered by United Parcel Service, an interstate conveyance, as a result of an order placed to NALPAC, LTD., of Oak Park, Michigan, by LANA CHRISTINA ACTY on or about January 7, 1988.

This is in violation of Title 18, United States Code, Section 371.

THE GRAND JURY FURTHER CHARGES:

COUNT 4

From on or before the 4th day of November, 1989, up to, and including November 25, 1989, at Des Moines, Polk County, Iowa, in the Southern District of Iowa, the Defendants, LANA C. ACTY, d/b/a POSTERS' N THINGS, d/b/a WORLD WIDE IMPORTS and GEORGE MICHAEL MOORE, d/b/a G. MICHAEL MOORE ENTERPRISES, Defendants herein, did knowingly and intentionally aid and abet Randy Kennedy in the manufacture and distribution of cocaine, a Schedule II controlled substance.

This is in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 5

That on or before the 1st day of February, 1986, up to and including the 28th day of March, 1990, in the Southern District of Iowa and elsewhere, GEORGE MICHAEL MOORE, and LANA CHRISTINA ACTY, Defendants herein, having received income derived, directly or indirectly, from violations of 21 U.S.C. § 841(a), as described in Count 4 of this Indictment and incorporated by reference herein, did invest, directly and indirectly, such income in the acquisition of an interest in the establishment and the operation of the following enterprises:

POSTERS' N THINGS, LTD., d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT

ACTY-MOORE GALLERY

G. MICHAEL MOORE ENTERPRISES

including, but not limited to, the investment of said income in the inventory, equipment, and operating expenses of said enterprises, the activities of which affected interstate commerce.

This is in violation of Title 21, United States Code, Section 854.

THE GRAND JURY FURTHER CHARGES:

COUNT 6

That on or about August 17, 1989, and November 8, 1989, in the Southern District of Iowa and elsewhere, LANA CHRISTINA ACTY, Defendant herein, did knowingly and willfully conduct, and attempt to conduct, financial transactions affecting interstate commerce, to wit, the transfer and exchange of monetary instruments by, through, and to a financial institution, which involved the proceeds of a specified unlawful activity, that is, the use of an interstate conveyance as part of a scheme to sell drug paraphernalia in violation of 21 U.S.C., § 857(a) and the aiding and abetting in the manufacture and distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, with the intent to promote the carrying on of specified unlawful activity, to wit, violations of 21 U.S.C. §§ 841(a) and 857, and that while conducting or attempting to conduct such financial transactions knew that the property involved in the financial transactions, that is, monetary instruments in the amount of $2,773.33 and $574.09, represented the proceeds of some form of unlawful activity.

This is in violation of Title 18, United States Code, Section 1956(a)(1)(A).

THE GRAND JURY FURTHER CHARGES:

COUNT 7

That on or about March 25, 1989, in the Southern District of Iowa and elsewhere, GEORGE MICHAEL MOORE, and LANA CHRISTINA ACTY, Defendants herein, did knowingly and willfully engage and attempt to engage in a monetary transaction affecting interstate commerce in criminally derived property of a value greater than $10,000, which property was derived from specified unlawful activity, to wit, the use of an interstate conveyance as part of a scheme to sell drug paraphernalia in violation of 21 U.S.C. § 857(a) and the aiding and abetting of the manufacture and distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, that is, the Defendants deposited, withdrew, transferred and exchanged a monetary instrument, to wit, a check written on the account of WORLD WIDE IMPORTS, by, through and to a financial institution, that is, EAST DES MOINES NATIONAL BANK as is more fully described as follows:

CHECK NUMBER:	14336
DATE:	March 25, 1989
PAYEE:	Karl Chevrolet, Inc.
AMOUNT:	$31,430.59
SIGNATORY:	LANA C. ACTY

This is in violation of Title 18, United States Code, Sections 1957 and Title 18, United States Code, Section 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 8

That on or about February 9, 1990, in the Southern District of Iowa and elsewhere, LANA CHRISTINA ACTY, Defendant herein, did knowingly and willfully engage and attempt to engage in a monetary transaction affecting interstate commerce in criminally derived property of a value greater than $10,000, which property was derived from specified unlawful activity, to wit, the use of an interstate conveyance as part of a scheme to sell drug paraphernalia in violation of 21 U.S.C. § 857(a) and the aiding and abetting of the manufacture and distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, that is, the Defendant deposited, withdrew, transferred and exchanged a monetary instrument, to wit, a check written on the account of LANA C. ACTY, by, through and to a financial institution, that is, NORWEST BANK DES MOINES N.A., as is more fully described as follows:

CHECK NUMBER:	3986
DATE:	February 9, 1990
PAYEE:	Dean, Witter, Reynolds, Inc.
AMOUNT:	$100,000.00
SIGNATORY:	LANA C. ACTY

This is in violation of Title 18, United States Code, Sections 1957.

THE GRAND JURY FURTHER CHARGES:

COUNT 9

From an unknown date, but commencing at least as early as January 26, 1987, and continuing up to and including March 28, 1990, in the Southern District of Iowa, and elsewhere, the Defendants, GEORGE MICHAEL MOORE and LANA CHRISTINA ACTY, Defendants herein, did knowingly and willfully combine, conspire, confederate, and agree, with each other and with persons known and unknown to the Grand Jury, to commit an offense against the United States, that is, to violate Title 18, United States Code, Section 1956(a).

It was the purpose and object of this conspiracy to knowingly and willfully conduct and attempt to conduct financial transactions affecting interstate commerce which involved the proceeds of a specified unlawful activity, that is, the use of an interstate facility as part of a scheme to sell drug paraphernalia in violation of 21 U.S.C., § 857(a) and the aiding and abetting of the manufacture and distribution of controlled substances in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, with the intent to promote the carrying on of the specified unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of said specified unlawful activity, and that while conducting and attempting to conduct such financial transactions knew that the property involved in the financial transaction, that is, funds, represented the proceeds of some form of unlawful activity in violation of Title 18, United States Code, Section 1956(a).

OVERT ACTS

In furtherance of this conspiracy and to effect the objects thereof, there were committed, by at least one of the coconspirators herein, in the Southern District of Iowa, at least one of the following overt acts, among others:

a. On or about March 25, 1989, the Defendants engaged in a financial transaction involving a monetary instrument, to wit, a check in the amount of $31,430.59, drawn on the account of WORLD WIDE IMPORTS at EAST DES MOINES NATIONAL BANK, dated March 25, 1989, and payable to Karl Chevrolet, Inc., and conducted or attempted to conduct a financial transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate commerce in any way or degree, by causing the withdrawal, payment, and transfer of funds out of this account by this financial institution;

b. On or about February 9, 1990, the Defendants engaged in a financial transaction involving a monetary instrument, to wit, a check in the amount of $100,000.00 drawn on the account of LANA C. ACTY at NORWEST BANK DES MOINES, N.A., dated February 9, 1990, and payable to DEAN, WITTER, REYNOLDS, INC., and conducted or attempted to conduct a financial transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate commerce in any way or degree, by causing the withdrawal, payment and transfer of funds out of this account by this financial institution; and

c. On or about September 25, 1988, the Defendants engaged in a financial transaction involving a monetary instrument, to wit, a check in the amount of $45,000.00 drawn on the account of FORBIDDEN FRUIT (POSTERS' N THINGS, LTD.) at EAST DES MOINES NATIONAL BANK, dated September 25, 1988, and payable to LANA C. ACTY, and conducted or attempted to conduct a financial transaction involving the use of a financial institution which is engaged in, or the activities which affect, interstate commerce in any way or degree, by causing the withdrawal, payment and transfer of funds out of this account by this financial institution.

This is in violation of Title 18, United States Code, Section 371.

THE GRAND JURY FURTHER CHARGES:

COUNT 10

Between on or about February 1, 1986, and March 28, 1990, GEORGE MICHAEL MOORE, LANA C. ACTY, and POSTERS' N THINGS LTD, d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT, Defendants herein, engaged in conduct in violation of Title 21, United States Code, Sections 841(a)(1), 854, and Title 18, United States Code, Section 2, each punishable by imprisonment for more than one year, thereby subjecting to forfeiture to the United States the following property and interests:

1. All of the interests and property of GEORGE MICHAEL MOORE, LANA C. ACTY, and POSTERS' N THINGS LTD, Defendants herein, which was used, and intended to be used, in any manner or part to commit or to facilitate the commission of their violations of Title 21,

United States Code, Sections 841(a)(1), 854, and Title 18, United States Code, Section 2, including, but not limited to, the following:

a. All of that lot or parcel.of land, together with its buildings, improvements, fixtures, attachments and easements, located at 3500 Eula Drive, Urbandale, Iowa;

b. All of the inventory, equipment, and assets of POSTERS' N THINGS, LTD., d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT;

c. All of the inventory, equipment, and assets of ACTY-MOORE GALLERY, including all prints, statues and other art work;

d. All motor vehicles involved in the aforementioned offenses, including:

1) One 1989 red Chevrolet Corvette, VIN 1G1YY3185K5113040, bearing Iowa License Plate UIF001;

2) One 1986 black Mercedes Benz 560SEC M-B, VIN WDBCA45D4GA256819, bearing Iowa license QJK070;

3) One 1986 blue Mercedes Benz 560 SEL, VIN WDBCA39D4GA248742, bearing Iowa License Plate UHJ433;

e. All currency, or its equivalent, currently being held personally or in the accounts of financial institutions in the name of the above-named Defendants which was involved in such offenses;

f. All stocks, bonds, and other securities or commodities held personally or in the accounts of financial institutions in the name of the aforementioned Defendants which was involved in such offenses; and

g. All gold, precious metals, jewelry, or similar investments owned by the aforementioned Defendants which was involved in such offenses.

2. All of the interests and property of GEORGE MICHAEL MOORE, LANA C. ACTY, and POSTERS' N THINGS LTD, Defendants herein, constituting, or derived from, any proceeds that the said Defendants obtained, directly or indirectly, as a result of such violations, including, but not limited to, the interests and property identified in paragraph 1., above.

The aforementioned properties are subject to forfeiture pursuant to Title 21, United States Code, Section 853(a)(1) and (2).

THE GRAND JURY FURTHER CHARGES:

COUNT 11

Between on or about the 26th day of January, 1987, up to and including the 28th day of March, 1990, GEORGE MICHAEL MOORE, LANA C. ACTY, and POSTERS' N THINGS LTD, d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT, Defendants herein, engaged in conduct (as specified in Counts 6 through 9, above) in violation of Title 18, United States Code, Sections 1956, 1957, 371, and 2, each punishable by imprisonment for more than one year, thereby subjecting to forfeiture to the United States pursuant to Title 18, United States Code, Section 982, the following property and interests:

All of the Defendants interest in real and personal property involved in such offense, and all property traceable to such property, and subject to forfeiture pursuant to Title 18, United States Code, Section 982, including, but not limited to the following:

1. All of that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, located at 3500 Eula Drive, Urbandale, Iowa;

2. All of the inventory, equipment, and assets of POSTERS' AND THINGS, LTD., d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT;

3. All of the inventory, equipment, and assets of ACTY-MOORE GALLERY, including all prints, statues and other art work;

4. All motor vehicles involved in the aforementioned offenses, including:

a. One 1989 red Chevrolet Corvette, VIN 1G1YY3185K5113040, bearing Iowa License Plate UIF001;

b. One 1986 black Mercedes Benz 560SEC M-B, VIN WDBCA45D4GA256819, bearing Iowa license QJK070;

c. One 1986 blue Mercedes Benz 560 SEL, VIN WDBCA39D4GA248742, bearing Iowa License Plate UHJ433;

5. All currency, or its equivalent, currently being held personally or in the accounts of financial institutions

in the name of the above-named Defendants which was involved in such offenses;

6. All stocks, bonds, and other securities or commodities held personally or in the accounts of financial institutions in the name of the aforementioned Defendants which was involved in such offenses; and

7. All gold, precious metals, jewelry, or similar investments owned by the aforementioned Defendants which was involved in such offenses.

The aforementioned properties are subject to forfeiture pursuant to Title 18, United States Code, Section 982(a).

A TRUE BILL.

/s/ Charles F. Simon
FOREPERSON

/s/ JOSEPH S. BECK
Asst. UNITED
STATES ATTORNEY

I DO HEREBY CERTIFY
THAT THIS IS A TRUE
AND FULL COPY OF
THE ORIGINAL.

CERTIFIED: MAY 16 1990
JAMES R. ROSENBAUM
CLERK, U.S. DISTRICT
COURT

BY /s/ Ronald R. Wright
DEPUTY CLERK

(LOGO) **U.S. Department of Justice**

United States Attorney
Southern District of Iowa

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115 United States Courthouse FTS: 862-6257
Des Moines, Iowa 50309 515/284-6257

May 31, 1990

HAND DELIVERY

Mr. Lawrence F. Scalise
Attorney at Law
2910 Grand Avenue
Des Moines, Iowa 50312

Re: United States v. George Michael Moore
Criminal No. 90-33

Dear Larry:

You have advised the United States Attorney's Office that you are interested in pursuing negotiations to arrive at a plea agreement regarding the criminal charges presently facing Mr. Moore in this District. We also are interested in pursuing this matter in order to arrive at an equitable resolution of the numerous criminal charges and forfeitures that your client presently faces and will be facing in the future. The following procedure is necessary in order to place the United States in a position to adequately evaluate whether entering into such an agreement is in its best interest.

It has been proposed that you and your client meet with investigating agents for the purpose of a discussion of a proffer. We are willing to consider such a proffer or discussion when formulating an appropriate resolution of this matter. Specifically, it is necessary for investigators to assess the degree of assistance your client can give the on-going investigation. Additionally, it is necessary for the United States Government to precisely identify the assets in which your client has any interest or over which he exercises any control.

In order to ensure that there are no misunderstandings concerning the meaning of a pre-plea proffer, I am clarifying the ground rules within this letter.

First, no statements made or other information provided by your client during the proffer or discussion will be used against him in the United States Government's case-in-chief. We will make arrangements for the proffer to be made to separate agent(s) of the FBI and/or DEA who are not directly involved in this prosecution, whose responsibility will be to assess and evaluate your client's credibility and the value of his cooperation.

Second, your client must agree to waive his right to a *Kastigar* hearing, unless your client first presents direct evidence of, and the Court finds, a violation of the preceding paragraph. (*See, Kastigar v. United States,* 406 U.S. 441, *reh'g denied,* 408 U.S. 931 (1972)).

As you are aware, the United States already has substantial evidence available to present at the trial in this matter. And, our office is not inclined to allow *Kastigar* issues to be raised merely as a result of allowing a pre-plea proffer and debriefing.

Third, in the event that your client is a witness at the trial of the above-captioned matter and offers testimony materially different from any statements made or other information provided during the proffer, the attorney for the United States Government may cross-examine him concerning any statements made or other information provided. This provision is necessary in order to ensure that Mr. Moore does not abuse the opportunity for a proffer or discussion, does not make materially false statements to a Government agency, and does not commit perjury when testifying at trial.

Fourth, Mr. Moore must agree to submit to polygraph examination(s) by a polygrapher selected by the United States Government in order to ensure his full cooperation with the investigation and disclosure of information.

As we have discussed, the proffer to be made by your client is only the first step towards further plea negotiations. A separate, written offer to discuss further plea negotiations will need to follow the proffer; the proffer does not obligate the United States to take any further action.

Similarly, a determination that your client's cooperation does not merit special consideration will result in the suspension of further plea negotiations, giving full recognition to the first condition identified above.

Mr. Moore should sign this letter where indicated below. Once signed, please return the original to me and retain a copy for your files.

Very truly yours,

Gene W. Shepard
United States Attorney

/s/ Kevin E. VanderSchel
Kevin E. VanderSchel
Assistant U.S. Attorney

KEV:skf

I understand the terms and conditions of this letter and agree to be bound by them.

Defendant: George Michael Moore — Date

Lawrence F. Scalise
Attorney for Defendant — Date

GOVERNMENT
EXHIBIT
5

(LOGO) **U.S. Department of Justice**

United States Attorney
Southern District of Iowa

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115 United States Courthouse FTS: 862-6257
Des Moines, Iowa 50309 515/284-6257

June 11, 1990

CONFIDENTIAL

Mr. Lawrence F. Scalise
Attorney at Law
2910 Grand Avenue
Des Moines, Iowa 50312

Re: U.S. v. World Wide Imports, Et al.;

Dear Larry:

As a follow up to my letter which was hand delivered to your office on May 31, 1990, this office has confirmed that the agents to be assigned for any debriefing will be Special Agent James Donlan, FBI, and Special Agent Art Vogel, DEA.

After discussing this matter with Lester Paff since the delivery of that letter, it has been determined that a limitation should be placed upon when the letter must be returned to this office. In this regard, you are hereby advised that if the letter is not signed and returned to this office by Friday, June 15, 1990, along with specific arrangements for a debriefing no later than June 18, 1990, the May 31, 1990, letter shall be considered by this office to be null and void.

Please contact me upon receipt of this letter to further discuss the foregoing.

Very truly yours,

Gene W. Shepard
United States Attorney

/s/ Kevin E. VanderSchel
Kevin E. VanderSchel
Assistant U.S. Attorney

KEV:skf

UNITED STATES DISTRICT COURT

SOUTHERN District of IOWA

UNITED STATES OF AMERICA V. LANA CHRISTINE ACTY (Name of Defendant)	**JUDGMENT IN A CRIMINAL CASE (For Offenses Committed on or After November 1, 1987)** (Filed Jun 11, 1991) Case Number: Cr. 90-33-03 Robert T. Vaughn Defendant's Attorney

THE DEFENDANT:

_ pleaded guilty to count(s) ____________________

X was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8 and 9 after plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:857 (a) (1)	Use interstate conveyance for sale	8-17-89	1
" "	drug paraphernalia	11-8-89	2
18:371	Conspiracy to use interstate conveyance for sale drug paraphernalia	3-28-90	3 & 9

21:841 (a) (1) and 18:2	Aid & abet manufacture & dist. cocaine	11-25-89	4
21:854	Investment of illicit drug profits	3-28-90	5
18:1956 (a) (1) (A)	Laundering monetary instruments	11-8-89	6
18:1957 & 18:2	Engage in monetary trans. in prop. derived spec. unlawful activity	3-25-89	7
" "		2-9-90	8

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_ The defendant has been found not guilty on count(s) ______________ and is discharged as to such count(s).

_ Count(s) __ (is) (are) dismissed on the motion of the United States

X It is ordered that the defendant shall pay a special assessment of $450.00 , for count(s) 1, 2, 3, 4, 5, 6, 7, 8 and 9 , which shall be due X immediately _ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 578-64-2213

Defendant's Date of Birth: 12/12/48

Defendant's Mailing Address:
3500 Eula Drive

Urbandale, Ia

Defendant's Residence
Address:

June 7, 1991
Date of Imposition
of Sentences

/s/ Charles R. Wolle
Signature of Judicial
Officer

CHARLES R. WOLLE,
U. S. DISTRICT JUDGE
Name & Title of
Judicial Officer

June 11, 1991
Date

cc: Customs; IRS, Postal

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 108 months on each of counts 1, 2, 3, 4, 5, 6, 7, 8 and 9 to run concurrently with each other.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.

__ The defendant shall surrender to the United States marshal for this district.

__ at ____ a.m.

__ at ____ p.m. on ________________________ .

__ as notified by the United States marshal.

__ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

__ before 2 p.m. on _______ .

__ as notified by the United States marshal.

__ as notified by the probation office.

RETURN

I have executed this judgment as follows:

____

____

____

____

Defendant delivered on ______ to ______________ at

_____________, with a certified copy of this judgment.

____
United States Marshall

By ______________________
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

_ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $150,000.00 . The fine includes any cost of incarceration and/or supervision.

_ This amount is the total of the fines imposed on individual counts, as follows:

_ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

  _ The interest requirement is waived.

  _ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

_ in full immediately.

X in full not later than July 1, 1991, unless notice of appeal is filed, then within ten (10) days after final judgment is entered on the sentence following decision or other disposition of the appeal. Interest will be payable from July 1, 1991 until paid in full.

_ in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

_ in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

_ The court adopts the factual findings and guideline application in the presentence report.

OR

X The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): As stated on the record at sentencing. In summary, the Court finds that $1,500,000 of the defendant's moneys laundered were the proceeds of an unlawful activity under guideline 2S1.1(b)(2). The amount of cocaine attributable to defendant under count IV, aiding and abetting, is 100 kilograms of cocaine, consisting of the dilutants sold by defendant and cocaine mixed in by others.

Guideline Range Determined by the Court:

Total Offense Level: 31 (By reason of grouping with departure explained below)

Criminal History Category: I

Imprisonment Range: 108 to 135 months

Supervised Release Range: ____ ~~to~~ 5 years

Fine Range: $15,000 to $150,000

_ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $------

_ Full restitution is not ordered for the following reason(s):

_ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines:

OR

_ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

_ upon motion of the government, as a result of defendant's substantial assistance.

X for the following reason(s). As stated on the record at sentencing. In summary, the Court departs pursuant to Policy Statement 5K2.0 by not including in the grouping of counts the aiding and abetting conviction under count IV. The Court finds that the Sentencing Commission, in determining the appropriate range for aiding and abetting sale and manufacture of controlled substances, did not have in mind nor adequately provide a lower range for the type of circumstances involved here. (continued – over)

DEFENDANT'S
EXHIBIT
H

Smith, Schneider, Stiles, Wimer, Hudson,
Serangeli, Robinson, Mallaney,
Shindler & Scalise, P.C.

ATTORNEYS AND COUNSELORS AT LAW

TENTH FLOOR, EQUITABLE BUILDING
DES MOINES, IOWA 50309-3715
(515) 245-6789
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DONALD L. CARR II
ROGER J. HUDSON
MICHAEL P. MALLANEY
RONALD L. MOUNTSIER
GARY A. ROBINSON
LAWRENCE F. SCALISE
FRED R. SCHNEIDER
WILLIAM B. SERANGELI
STEVE M. SHINDLER*
WILLIAM SIDNEY SMITH
WILLIAM R. STILES

BRENT A. CASHATT
JOAN M. DENTON
R. J. HUDSON, II
MICHAEL E. MARSHALL
EDWARD G. PARKER
THOMAS T. TARBOX

*ALSO LICENSED IN
MISSOURI AND
NEBRASKA

WILLIAM WIMER
(1930-1993)

August 25, 1994

Alfredo Parrish
PARRISH, KRUIDENIER, MOSS,
DUNN, MONTGOMERY & THOMAS
2910 Grand Avenue
Des Moines, Iowa 50312

Re: United States v. Acty

Dear Al:

Yesterday I received a Subpoena commanding me to appear at your office on August 30, 1994, at 12:00 noon, I assume for lunch.

I was also commanded to bring with me the Lana Christine Acty file. I don't have any file. Any file that we would have had would have been picked up by Ms. Acty a long time ago, over three (3) years ago. But, in any case, you should know that I did not represent Ms. Acty, so I wouldn't have any file that related to her.

I assume you are going to buy my lunch and otherwise provide for my needs.

You understand of course, that if you are not going to buy my lunch you won't see me on the 30th.

Best personal regards,

Larry Lawrence F. Scalise
For the Firm

LFS:dd